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A
TREATISE
ON THE
LAW
OF
OBLIGATIONS,
OR 1431
CONTRACTS.

By M. POTHIER.

TRANSLATED FROM THE FRENCH,
WITH AN INTRODUCTION, APPENDIX, AND NOTES,
ILLUSTRATIVE OF THE ENGLISH LAW ON THE SUBJECT.

By WILLIAM DAVID EVANS, Esq.
BARRISTER AT LAW.

IN TWO VOLUMES.
VOL. I.

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ELOGE OF M. POTHIER;

*Pronounced upon his decease, in the University of Orleans,
by M. Le Trosne, the King's Advocate, in the Presidial
of Orleans.*

FIRST PART.

M. POTHIER was born at *Orleans*, on the 9th of *January*, 1699, of an honourable family, his father was a *Counsellor* of the *Presidial* there. He was born with an extremely feeble constitution, which he strengthened by temperance and sobriety, and by the dispositions afterwards excited by study and application. The mind, like the body, by want of proper exercise, loses the use of its faculties, which are rendered torpid by inaction. The chief advantage of an instructor consists in subduing levity by application, in regulating and moderating the imagination, in forming the judgment, in giving resources to the mind, by accustoming it to reflect, to examine, to discuss. But talent in instructors is infinitely more rare, than suitable dispositions in pupils; and how many persons are rendered incapable of serious and connected study, for want of adequate cultivation!

Pothier was entirely destitute of such assistance. He lost his father at the age of five, and had no resources for his education, but in himself. The *College of Jesuits* was then very feebly supported, he studied there with advantage, because persons of genius, if placed in their proper course, are indebted for their progress only to themselves. The great authors of antiquity were his masters; as soon as he was capable of understanding their works, he conceived that relish for them, which is the surest harbinger of success. Assisted by a happy memory, and a great readiness of perception, he completed his store of erudition without assistance, and acquired a fund of literature, which he ever afterwards retained, without having leisure to cultivate it, and that accuracy of discrimination, which is the most valuable fruit of a judicious study.

He graduated in the science of law, (*il fit son droit*) in the university of *Orleans*, upon which he was destined to reflect such great celebrity; and had there even less assistance in this pursuit, than he had received at the college, in the cultivation of literature. The professors who then occupied the chairs of the university were absolutely indifferent to the progress of the students, and satisfied themselves with delivering some unintelligible lectures, without deigning to accommodate themselves to the capacity of their hearers. What they taught was not properly the science of jurisprudence, a science in itself so beautiful and luminous, but of which they presented nothing but the perplexities and contradictions, foreign to its nature, and introduced by the incapacity and infidelity of the compilers of the *pandects*; instead of giving an instructive explanation of the texts, they entirely filled their lectures with the subtle questions invented and multiplied in the schools of controversy.

From their mode of tuition, it might be supposed, that their only object was to exclude the students from the sanctuary of the laws, by the disgust which their instruction was calculated to excite; like the ancient *Patricians*, who in order to keep the people in subjection, concealed from them with so much care the formulæ of actions; and appropriated to themselves the knowledge of the laws, which they studiously enveloped with a veil of mystery. A tuition so defective could not satisfy the solid and judicious mind of *Pothier*; fortunately he was capable of surmounting it; he perceived the defects of it, and supplied by his own industry the want of other assistance. In every science the first steps are attended with the greatest difficulty; these he surmounted by the serious study of the institutes, assisted by the commentaries of *Vinnius*, and thus prepared himself for penetrating to the very sources of juridical science; and it was ordained that he should exhibit in the intercourse of civil life the most striking example of every social virtue, and become the oracle of jurisprudence to his contemporaries and posterity.

He decided upon embracing the functions of magistracy, and was received a counsellor of the *Presidial*, in 1720. His choice of situation entirely determined that of his studies: from that time literature was only admitted as a transient amusement, and he was afterwards obliged entirely to abandon it, by the multiplicity of his occupations; but from these flowers he had gathered the most valuable fruits, an acquaintance with the best authors, and the habit of writing in Latin, which became so necessary to him. In conversation with his friends, his memory presented the finest passages of *Horace*, and of *Juvenal*, to whose force and energy

energy he was principally attached, and he recited them with a spirit peculiar to himself.

For the first ten or twelve years after his reception, he joined to the study of jurisprudence that of religion and theology, which he was fond of deriving from their sources, and principally from *St. Augustin*, and those great men, the *Messieurs de Port Royal*, for whom he had the highest veneration. *M. Nicole* was always his favourite author, as he is of all judicious persons, who prefer solidity of reasoning to the charms of eloquence.

But this particular study never infringed upon the duties of his employments. His great facility, and a rigorous economy of his time, gave him sufficient opportunity for both. He was the first magistrate in the bailliage of *Orleans*, who exercised the right of giving an opinion in the cases which they are appointed to report, while under twenty-five years of age; and never was a deviation made from the general practice with greater advantage. While he was beginning in his study to acquire that fund of knowledge, which from the most assiduous application of fifty years became so rich and extensive, he was learning the application of it at the Palace by that practice, of which nothing can supply the deficiency. To this he added frequent conversations with an advocate of great erudition; his very walks were conferences; and he most frequently associated with a friend, with whom he had learned *Italian*, and they discussed the questions that occurred to them in that language, for the sake of preserving their familiarity with it.

He had scarcely attained his majority, (25) when the extent of his acquisitions was perceived at the Palace. When he had to study any subject, he composed a treatise upon it, being persuaded that the best, and perhaps the only method of becoming master of a science, is to discuss it in writing. The necessity of a just conception, in order to produce a just expression, of arranging his ideas in proper order, of contemplating them in their various aspects, habituates the mind to application, and accustoms it to accuracy and method; an advantage which can never be acquired by reading, however frequently repeated.

Pothier no sooner began to study the digest, than he perceived that invincible attraction, which *Mallebranche* experienced in the reading of *Descartes*. He felt his vocation, and followed it.

The laws of the *Romans* form a more interesting part of their history than their victories and conquests. But if the knowledge of them had been nothing more than an object of curiosity, the labour of *Pothier* would have only been of moderate utility, and we may be assured, that he would not have undertaken it. But

the *Roman* laws will be regarded in all ages, and all nations, as the real source of right and justice. After deducting what particularly concerns the manners of the people, their constitution, and forms of procedure, the remainder is derived from the real principles of justice and injustice, applied to the various actions and relations arising in the intercourse of society.

The civil law became therefore the principal object of his studies; he was fixed to it by that attachment, which is the pledge and harbinger of success. But, the farther he advanced in this labour, the more sensible he became of the imperfection and disorder of the compilation of the *Roman* laws which is at present extant. He was not disgusted with this defect; without his knowledge he was destined to repair it. Every jurist, since the discovery of the pandects, had felt the inconvenience of this disorder, and had surmounted it for himself by dint of application; but none of them had ventured to remove the difficulty for others. It would not have occurred to *Pothier*, if he had not been engaged in it in a manner which prevented his declining it. He had begun the employment for his own use; but his modesty did not allow him to form the design of completing and publishing it. He judged of the difficulty of the attempt by the ill-success of *Vigelius*, a celebrated German, who had attempted it; but he had finished the paratitles upon the pandects, and this was making a start. He had also formed a plan for restoring the order of the texts, and had executed it with respect to several important titles. He communicated one of these essays to *M. Prevôt de la Janés*, Counsellor of the *Presidial*, and Professor of *French* law; who judging of the possibility of success from the specimen which he saw, devised a method of overcoming the modesty of *Pothier*.

He apprised the *Chancellor D'Aguesseau* of the merit and talents of the author, of his plan, and his success. The *Chancellor*, who discerned all the importance of the undertaking, requested *M. de la Janés* to encourage *Pothier* to proceed; and at length he promised what was desired of him, and devoted himself entirely to accomplishing the engagement. He sent the *Chancellor* several specimens of his progress, with which that magistrate expressed great satisfaction, and invited him to come and converse with him respecting the undertaking, and communicated his own views of its perfection in a letter, which equally manifests his great erudition and his sentiments concerning this performance *.

* It may be acceptable to insert some extracts from the letters of the *Chancellor* to *M. Pothier*, they are to be found in the Cabinet of *M. de Janés*, who collected them. These letters manifest the erudition of the *Chancellor*, his esteem for the author, and the idea he had

To shew the extent and value of the labours of *M. Pothier*, it is necessary to give a sketch of this work.

formed of this work, the execution of which he had very much at heart. The approbation of such a man as *D'Aguesseau* is the highest of commendations.

The first letter has not been found, the second is as follows :

"I have received your work upon the title *De Solutionibus*, and shall take the advantage of the first moment of leisure, to examine it with all the attention due to a work of much difficulty if rightly executed, and of which the mere undertaking is laudable. I shall communicate to you with pleasure my reflections upon it, in order to assist you in affording to the public the fruit of your labours."—*Feb 7, 1736.*

Third letter : "I am highly gratified with what I have seen of the work which you have undertaken, and which is pretty far advanced, upon the *Roman* jurisprudence ; and I discover in it an order, a neatness, and a precision, which will render it as useful as the undertaking it is laudable. It appears to me, that it may be carried to a still greater degree of perfection, and a few remarks which I made in reading it may have that tendency. As it would occupy much time to go at length into this subject in writing, I should be happy to have some conversation with you, in order that I may lay my thoughts more fully before you : your vacation is approaching ; and if you would take the opportunity of passing two or three days at *Paris*, I shall be proud to be acquainted with a man of your merit, and to impart to you my reflections. But if you have no other reasons for bringing you here, you had better give me notice of the time when you think of coming, in order that I may acquaint you whether I shall be at leisure at any particular time that may be convenient to you. The good use which you make of your leisure induces me to pay this attention to your time, which you will regard as a proof of the esteem with which I am, &c."—*Sept. 8, 1736.*

Pothier went to *Paris* in consequence of this letter, and had a conference with the *Chancellor*, who sent him, on the 24th *September*, a paper containing his view of the perfection of the work. It may be seen, that *Pothier* availed himself of it. The *Chancellor* ends this little memoir by a comparison of the work of *Vigilius* with the plan of *Pothier*, which is so superior to it. He thus expresses himself :

"The work of *Vigilius*, who had in contemplation a plan very similar to that of *Pothier*, would be of great service to him ; there is something better, and more useful in the design of *Pothier*, because he only uses the terms of the laws, and gives the text in its purity ; instead of which, *Vigilius* writes almost always in his own terms, without confining himself to the expressions of the jurists, and contents himself with stating the principles of the laws which he refers to."

Pothier was accustomed to send parts of his work at different times to *D'Aguesseau*, giving him an account of his progress, as may be observed by the answers relating to them.

"I observe with pleasure the perseverance with which you continue to apply to a work so vast and laborious, as that of which you have already completed a considerable portion. I have long reproached myself for my silence, with regard to the last specimens you sent to me ; but besides that I have not had so much time, as I could have wished to write to you upon this subject, I think it will be better to let you advance in your work, with which I have been much pleased, because the remarks which may be made upon it will come with more advantage after a revision of the whole performance. It were to be wished that you had assistants capable of diminishing your labours, by dividing them with you. You will favour me by acquainting me from time to time with your progress."—*Jan. 1, 1739.*

"I could not find time sooner to answer your letter respecting your great work. I perceive with pleasure, that you go on with indefatigable application, and invincible courage. The analyses which are to be placed at the head of each title will be of great use to students ; they form, as it were, the elements of civil jurisprudence ; you will be the first to profit by the views which this work gives you, by bringing what you have done so well to a still greater perfection. It would be very desirable for you to find some one who could assist you with regard to the notes : I cannot sufficiently praise the constancy and diligence, with which

The law of the twelve tables was the foundation of the *Roman* civil law. This celebrated law, the principles of which were obtained by sending an embassy into *Greece*, and which so many great men have extolled above the most vaunted works of the philosophers, was of singular brevity and simplicity. By degrees, the aid of interpretation was found necessary in applying it to the multitude and variety of occurrences; this, from time to time, occasioned an immense number of commentaries and explanations. These various expositions of the law of the twelve tables were the source of what is called the *Civil Law*, in a strict sense; and as contra-distinguished from the laws, (*jus prudentum interpretatione, vel disputatione fori introductum,*) of which it had not either the character or authority. The *Prætors* adopted this jurisprudence, by which they found a method of molifying the law of the twelve tables, and of mitigating its excessive strictness; and as the new jurisprudence was not as yet invariably fixed, they announced by their edicts, at the commencement of their magistracy*, the principles by which they intended to judge. The formulæ invented for the prosecution of actions were likewise a part of the civil law, which had become so considerable even in the time of *Cicero*, that he was induced to complain of its immensity.

you continue to devote yourself to a work so painful and immense, nor assure you with how much esteem I am, &c."—*Aug. 23, 1740.*

"You will take the trouble of letting me know to what the necessary expence of a copy of this work will amount."—*June 10, 1741.*

M. Potbier made a journey to *Paris* in 1742, as appears by the following letter:—
 "I have placed your first memoir in the hands of *M. d'Argenson*, who is not less disposed than myself to procure for you every accommodation which you may have occasion for, in the impression of the great work which you have nearly finished with indefatigable labour. I am to hear from him to-morrow morning, and if you will call at my house in *Paris*, on *Wednesday* morning, I shall be able to give you a more precise answer."—*March 3, 1742.*

M. Potbier published his prospectus in 1744, and received the following letter from the *Chancellor* on the occasion:—"I received with much pleasure the prospectus of your great work; you know how much I approved the design, and the different specimens of it which I have seen. The last which you have had printed completes the favourable idea I had formed of your work, and the form of the impression and the character seem convenient. I shall take care to have it announced in the *Journal des Sçavans*, in order to procure immediately the greatest number of subscriptions possible. They will not wait long if the impression of the public always corresponded with the merits of a work."—*Dec. 6, 1744.*

"I doubt not, you will employ this year as usefully as the others, in finishing and printing the great work which has occupied you so long, and which appears to have met with a more favourable reception from the public. If the two titles, *De Verborum Significatione*, and *De Diversis Regulis Juris Antiqui*, are entirely finished on your part, I should be glad if you would send them to me, or bring them when you may have occasion to visit *Paris*, because I have taken some views of these two titles, from which I think you may derive some advantage, in order to give them all the perfection necessary, if you have not already anticipated me."—*Jan. 10, 1745.*

* Originally the *Prætors* judged without any restriction.

But

But what prodigious accessions did it afterwards receive, not only by the *Senatus consulta*, which under *Tiberius* acquired the force of laws, and by the constitutions of the emperors, but still more by the decisions, the consultations, and the writings of the jurists, *Trebatius*, *Labeo*, *Capito*, *Sabinus*, *Proculus*, *Julianus*, *Africanus*, *Caius*, *Scaevola*, *Papinian*, *Paulus*, *Ulpian*, *Aquila*, and many others too numerous to mention. Their decisions had not the force of law in themselves, but by usage they had acquired a very great authority; they were consulted and followed in juridical determinations, and were regarded as a kind of unwritten law.

The civil law, derived from so many different sources, had in a series of time become an immense collection, and its extent was so vast as to threaten its ruin. The changes which took place in the constitution, in manners and religion, after Constantinople had become the seat of Empire, had necessarily produced several alterations in the ancient law, and the knowledge and the study of it had by degrees fallen into neglect.

It therefore became very desirable to construct from so many scattered materials a single and regular edifice. How fortunate would it have been if so important a work had been executed in a more learned and enlightened age, instead of being deferred to the sixth century, when it was undertaken by the order of *Justinian*, at a time when taste had degenerated, and barbarism had begun to disfigure the Roman Empire.

A work which would have demanded one of those illustrious jurists who had not appeared for many ages, was committed to *Tribonianus*. But although he was very unequal to the undertaking, he might have rendered it less defective if he had employed the requisite time, and had executed it with more mature reflection. He had to peruse and abstract the works and particular treatises of a multitude of jurists, forming two thousand volumes; he had to compare the texts, to arrange them in a suitable order, to retrench a great number, adhering only to what was essential; to select upon every subject what was most important; to remove contradictions, without neglecting to shew the different opinions of the most distinguished jurists upon controverted questions; to preserve the knowledge of the ancient law, and to establish the alterations which had been made in it.

He allotted only three years to this labour; and with what negligence and disorder was it executed!

The ancient law is disfigured, not only by want of accuracy, but frequently by design; several texts are altered by interpolated additions, for the purpose of accommodating them to the new system. We are deprived of the knowledge of the ancient manners and laws

which still existed in the time of *Justinian*; and the traces which are left are rendered very obscure; so that it is only by dint of labour, examination, and conjecture, that we can distinguish what was then perfectly clear, and might easily have been preserved from confusion. We have only some scattered fragments of the law of the twelve tables, of which all the texts ought to have been inserted, and applied to their different subjects. Irreconcilable antinomies are left in a work invested with the authority of law, by blending the ancient jurisprudence with the modern, and by inserting the contradictory opinions of jurists of different sects, without indicating the causes of this opposition, and forming a decision between them.

The learned, since the revival of letters and the invention of printing, have laboured with incredible diligence to repair as much as possible the defects occasioned by the inaccuracy, the incapacity, and the infidelity, of the compilers of the pandects. Literature and juridical science afford each other a mutual assistance. The knowledge of the Roman law has acquired a new aspect, by the study of the Latin language, of history, and of ancient monuments, by the prevalence of sound criticism, and by the researches of antiquity; and men of letters have in the pandects discovered the solution of several obscure facts and usages.

The jurists have availed themselves of these lights to dissipate the obscurity which overwhelms the compilation of *Tribonianus*, they have penetrated by discussion into the sense of difficult texts; they have developed the ancient law; they have re-established the purity of the texts, reconciled many antinomies, and given reasons for those which would not admit of reconciliation; so that nothing remains to be wished for with respect to the discussion and understanding of the texts. The difference between the glosses of *Accursius* and the commentaries of *Alciatus*, proceeds from the times in which they wrote.—*Accursius* flourished in the beginning of the thirteenth century, and *Alciatus* wrote in the reign of *Francis I.*

It is thus that the sciences are brought to perfection by the accumulation of successive labours, producing by degrees a fund of riches and knowledge, which, without suffering any loss, is continually increasing. Every scholar adds the fruit of his studies, and facilitates the success, abridges the labour, and removes the difficulties of those who follow him. They may go so much the farther as they find the road already formed, and are thus enabled in a shorter time to pass a greater space. What pains and time would have been spared to those who have devoted themselves to the study of jurisprudence by the work of *Pothier*, if it had appeared some ages sooner.

In fact, notwithstanding all the pains and researches of so many jurists, for a period of six hundred years, the pandects still retained a very sensible defect, which was extremely prejudicial to the study and ready comprehension of the laws, in the disorder in which the texts are placed, not only in each title, but frequently dispersed in titles to which they have no relation.

The principal object of the work of *Pothier* was to remedy this disorder. It is intitled *Pandectæ Justinianæ in novum Ordinem digestæ*, and forms three volumes in folio.

He preserved the arrangement of titles, which is the order of the perpetual edict, upon which the jurist had commented; and under these titles he arranged all the texts in a methodical order, not only by changing their place in the title, but also by extracting laws from titles where they were misplaced; and inserting them under those to which they had the greatest relation.

At the head of each title is an introduction containing an exposition of the subject treated under it, and the texts which contain the definitions and first principles. Clear and full divisions in the course of the title facilitate the understanding of it, and assist the memory. The laws follow each other by easy transitions, which discover their relation, and indicate their connection. All the additions of the author are distinguished by Italics, so that the purity of the text is completely preserved.

The author applied himself to developpe the ancient law, to elucidate it, and to indicate the changes which it underwent. He directed his researches to the other parts of the digest which contain the traces of it, to the institutes and constitutions of *Justinian* which record for the purpose of abrogating it, to the paraphrase of *Theophilus*, the fragments which remain of the twelve tables, the works of the ancient jurists, and the vestiges of it which are discovered in history, and the other monuments of antiquity.

Of the laws of the code, some are conformable to the jurisprudence of the pandects; others change and abrogate it, but are still necessary for understanding the texts which were altered by *Tribonianus*, for the purpose of adapting them to the new system. The laws of the code which confirm the ancient jurisprudence are stated entire, being those of the Emperors anterior to *Constantine*. The subsequent laws, which it is easy to distinguish by their diffuse and barbarous style, are only cited by way of extract.

Lastly, the author has placed short but sufficient notes to such passages as are attended with difficulty, either on account of antinomies, or of alterations in the text; these notes are most frequently taken from *Cujas*, the greatest jurist since the revival of letters.

He unquestionably perused and consulted a great number of books,

books, for the purpose of accomplishing this great work. His own library was considerable, and he had also the use of the public library founded by *M. Proustau*, doctor of the University, the greater part of which relates to jurisprudence. But the books which he studied thoroughly and continually, as might easily be perceived by the condition of them in his library, were the pandects themselves, and the code, which he must have read over a great many times, and rendered so familiar as to have all the texts in a manner present together; the works of *Cujas*, and those of *Dumoulin*.

The two concluding titles of the digest are, *De Verborum Significatione* and *De Regulis Juris*. *Pothier* rendered these titles very important and extensive. They contain 275 pages in folio. In that *De Regulis Juris* he has comprised an abridgment of the whole law, collecting from all the books of the digest and arranging in excellent order those principles which are so fertile in their consequences, and which the Roman jurists expressed with such distinguished precision.

It appears that it was the chancellor who first conceived the idea of this part of the work, and recommended it at the beginning of the undertaking; that *M. Pothier*, after having completed these two titles, proposed to publish them as a separate work, but that he assented to the recommendation of the chancellor, who pointed out to him the advantage that would result from terminating the work by this collection, which presents a valuable abstract of it formed from the titles themselves.

The composition of this great work occupied *M. Pothier* more than twelve years, and more than twenty five, if we include, as is reasonable, the time which was employed in qualifying himself for it. He was assisted in the execution by *M. de Guienne*, an advocate in the parliament, his intimate friend, and I may also take the liberty of naming him as my own. *Pothier*, who, though he had a great fund of literature, was not fond of a polished and ornamental style, furnished him with the materials. There would have been no preface, or only a very short one, if it had not been undertaken by *M. de Guienne*. He also contributed a considerable part of the commentary upon the law of the twelve tables, which is at the beginning of the second volume.

With respect to the body of the work, although he only undertook the correction of the proofs, his labour was much more extensive and advantageous. He was a person of great exactness, not easily satisfied, a good critic, and a suitable associate for *Pothier*, who, attending only to the substance, would have neglected several matters of detail which contribute materially to the perfection of a work.

a work. He had not the extent of knowledge, or the great facility of *Pothier*, and on that account was not the less adapted for the labour of revision. If he met with a text which required to be elucidated, or which might be placed with more advantage in a different situation; or observed the neglect of a commodious transition, he communicated his remarks and objections to *Pothier*, which produced from him an alteration in the arrangement, an explanation, or a note.

Another intimate friend of *Pothier* was *M. Rousseau*, advocate, and professor of *French* law at *Paris*. Their attachment was of long standing. It was formed at *Paris*, where *Pothier* had frequently spent some time, both before 1730 and afterwards. He had there conferred with several celebrated advocates, who kept up an intercourse with him, and entertained all the esteem for him which he merited. But his correspondence with *Rousseau* was continual, and always turned upon their common studies. They met every year during their vacations.

M. Rousseau had great information, an excellent judgment, so ready an elocution, that it was difficult to follow him in the discussion of a question, and such a wonderful memory, that he not only recollected matters of substance, but cited without preparation the authorities by which he supported his opinion. It was from him, that *Pothier* learned what is called actual jurisprudence, which he did not always approve, but which it is necessary to know; a kind of versatile legislation, unfortunately too prevalent, and which would scarcely exist but for the imperfection of the laws.

Pothier had the highest respect for the opinion of *Rousseau*; they generally, but not always, coincided in their sentiments. In several passages of his treatises *Pothier* adduces the sentiments of *Rousseau*, either to combat them or to confirm his own, or to leave the reader to judge for himself upon certain questions with respect to which, without offering any judgment, he states the reason that may be urged in support of one opinion, and afterwards presents the opposite opinion of *Rousseau*.

The pandects formed a work of great magnitude, very expensive to print, written in Latin, and upon a subject the study of which is with us very much neglected. It was difficult to find booksellers willing to undertake it; they were afraid that the sale would be impossible, or at least very slow. The impression however went off with sufficient expedition, because the greatest part of it was taken by foreigners.

The only criticism which he had to encounter, was that of a journalist at *Leipsic*, who, either from jealousy that his own country had

had not the honour of so great an undertaking, or for some other motive, attacked it with acrimony, and spoke of it as a work in which there was nothing new or interesting, as a thing without merit, undertaken with a view to procure a reputation at a slight expence, and which wanted that fund of erudition, with which all juridical writings were formerly, and those of the *Germans* still are overloaded.

The friends of *Pothier* knew him well enough to be satisfied that he would not take the trouble of writing an answer. One of his colleagues undertook this charge, and he was first shewn the criticism, accompanied with the answer printed as a letter addressed to the authors of the *journal des Sçavans*. In this letter it was shewn that the *German* critic had not been sensible, either of the merit or of the object of the work; that the author had not proposed to make a commentary or to engage in discussions of erudition; but on the contrary to diminish the study of the commentaries which is still more laborious than that of the laws, to render the texts mutual commentaries to each other, and to illustrate them by the manner in which they were connected and arranged.

While the first volume of the *Pandects* was printing, *Pothier* fell dangerously ill; upon returning from a visit to one of his colleagues at *Sologne*, he came home on horse-back with a fever. He had never before been ill; for although of a feeble temperament, he had preserved his health by regularity. The fever was to him a new and unknown visitation, he struggled against it for some days without knowing what it was; and then instead of sending for his physician he went out to consult him, and ask him what was the cause of the indisposition which he suffered. The physician immediately perceived what it was, and directed him to return home and go to bed. The illness became very serious, and his life was despaired of.

Happily the disorder was overcome; but his recovery was not compleat: he was deprived of the use of his limbs, and submitted with great composure to this privation which continued so long, that it was apprehended it would never be removed. He felicitated himself in having preserved the power of diligence and application. He appropriated a greater portion of his time to study, which the sedentary life that he was obliged to lead gave him a greater liberty of doing, and had given up the hopes of ever recovering the use of his limbs, after having tried several remedies without effect, when it was conceived that his power of walking might be prevented not so much by any absolute defect as by long disuse, he was advised to endeavour to walk by the assistance of two pulleys, fixed in a grove attached to the beam of his chamber,

ber, which held him by the arms, and allowed him to move his limbs, without their having to bear the weight of his body. He submitted to this attempt, and by degrees recovered the use of his legs which only retained a degree of stiffness. He had been a great walker before his illness. He afterwards walked sufficiently from necessity, for the further he advanced in age the more his occupations multiplied, so as to preclude any remission. When he was pressed to take exercise, he answered that he had sufficient in passing between his own house and the court.

The study of jurisprudence had already began to revive in the university of *Orleans*. *M. Prevôt de la Janès*, counsellor of the presidial, and professor of *French* law, had perceived that extensive knowledge is not sufficient for a person whose office is to instruct, that it only renders him useful to himself in a situation instituted for the utility of others; unless he can give a relish to his instructions, and inspire a love of study. He was a person of very considerable merit and information, of a polished mind, and very agreeable conversation. He was fond of young men, and had the art of attaching them to him, and inspiring them with an ardour for success. This talent is the more particularly necessary in a professor of law, who has no other authority than that of reason and persuasion. His pupils are in that critical interval which separates youth from manhood; and are often the more enamoured of independence in proportion to the eagerness with which they have longed for the time that was to give them the possession of it; and if they happen to have retained a fondness for study, will naturally prefer the charms of literature to the austerity and dryness of jurisprudence.

M. de la Janès died in the month of *October*, 1749. The chancellor was very warmly solicited for his situation. He well knew the merit of *Pothier*, and wished to give it to him: *Pothier* on his side also desired the appointment, as well from his attachment to young persons as for the pleasure of instruction. But it was not his character to solicit, and his timidity was an impediment which it required some assistance to overcome. I am not certain whether *M. Gilbert de Voisins* removed this obstacle by offering him the chair on the part of the chancellor, or whether *Pothier* had the courage to surmount his natural disposition, so far as to intimate to *M. Gilbert*, that he should be flattered by the appointment. However this may be, he received it with general approbation. His satisfaction could only be diminished by the regret of having *M. Guyot* for his opponent, and of seeing him disappointed of a situation, which he could not have failed to obtain against any less formidable competitor. He had only wished for the appointment
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on account of the pleasure of communicating instruction; and he hoped to repair the failure of *M. Guyot*, by inducing him to accept a division of the emoluments. A conflict of generosity passed between them upon this occasion equally honourable to both; *Pothier* pressed and solicited the division as a favour, *M. Guyot* persisted in refusing it; and a few years afterwards received a joint appointment.

There is a complaint of the study of law falling into decay. The cause of this decline is the more serious, and the more difficult to be removed, as it is connected with the general state of manners in the kingdom, with the frivolity of the age, and with the dissipation of young persons who are introduced into society much too early. The most able and best intentioned masters can only struggle against this prevailing cause, and oppose it by their assiduity, their application, and their courage. Their success, notwithstanding all their exertions, will be confined to a small number of pupils desirous of profiting by their assistance.

Pothier succeeded a professor who had began to inspire emulation; and he found in those who still compose the university, colleagues impressed with the same views and the same zeal as himself.

The most celebrated men are not always the ablest masters, and even the depth of their knowledge seems to render this function the more painful to them; and to be an obstacle to the success of their instructions. The labour of composition has nothing but what is agreeable to a person who has pursued the regular study of a science; who has made himself master of it as a connected whole; and is familiar with all its parts. The ideas which he possesses crowd upon him, and claim an arrangement from his pen; if his mind is disposed with method, they assume without effort their natural order. The difficulties which occur are so far from repelling him, that they are an additional attraction. The necessity of forming a decision upon important questions compels him to look for objections, and to assure by discussion the truth of the sentiment which he embraces.

But the talent of instruction is altogether different, and is seldom combined with an extent of knowledge. To descend to the first elements, in order to be understood; to vary the information and the manner of presenting it, to be wholly occupied with others, and entirely forgetful of oneself; to be accommodated to the level of every capacity, so that the slowest intellect may comprehend what is presented without complaining of neglect; to appear to have no knowledge beyond what is communicated at the moment; to return to the same points for the purpose of impressing them; to descend

descend from principles to consequences by an easy gradation; to avoid stating more at a time than can be done conveniently and without overloading the hearers; to express every thing with method and clearness; to be satisfied that the hearers go along with you, and to take them by the hand to assist their progress. Such is the talent of an instructor; and such in a superior degree was that of *Pothier*. He had even the skill of so entirely concealing the superiority of the master, that the students supposed themselves to be conversing with a friend. His lectures were conferences, in which he supported the attention by questions, that enabled young men to direct their private studies with more advantage. The question was addressed only to one, and all endeavoured to find the answer. All were in expectation, because the next question might be addressed to themselves. If the answer was difficult in itself, the manner of putting the question would lead to the solution, indicating it to attentive minds, and at the same time leaving them the pleasure of inquiry and the honour of the discovery. The most trivial objection, even such as manifested either a want of proficiency, or the ignorance of a first principle, was attended to, and answered with kindness.

Whoever knows the effects of emulation, knows the efforts which men are capable of making when animated by so powerful an incentive, and can appreciate the progress which young persons who are favourably disposed will make under such a master; and his interesting manner of communicating instruction was admirably adapted to increase the number of them. I have already said, that *Pothier* only desired his appointment on account of the pleasure of conveying instruction, and that was the only advantage which he reserved to himself, as he divided the emoluments between the poor and his pupils. Instead of the examination in *French* law which used to terminate the course of studies, he substituted a public disputation on the subjects of tuition in the preceding year. The young men who chose to engage in the contest, prepared themselves for a long time before by serious application, none would venture to enter the lists without a confidence if not of victory at least of honour. The public who take an interest in the success of youthful efforts, felt a pleasure in attending this conflict, of which the university was the judge. The palm of victory was a medal of gold, adjudged in public, the other competitors were not without their reward, they received medals of silver.

It may easily be supposed that the combatants were not very tender towards each other; the disputation of each competitor occupied a sitting, during which all the others were his opponents,
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and he had to oppose each of them in their turns. The manner of proposing questions, and that of answering them, were equally taken into consideration in awarding the judgment. As they were all aware that the treatises which had been lectured upon during the preceding year, were as familiar to their opponents as themselves, they found it necessary to carry their researches further, and derived their arguments either from the text of the civil law, or the authors who had reference to the subject; and the conflict was so serious that the judges were sometimes obliged to repress the ardour of it, and interpose, either for correcting a deviation from the subject proposed, or to state with greater clearness the question which had been couched in an intricate form for the purpose of embarrassing the antagonist.

Pothier was not satisfied with encouraging his own pupils; nothing personal ever entered into his views; the students of the two first years who were destined afterwards to come under his tuition equally participated in his favours, and frequently even in the first year they were attracted to his lectures, by the love of study and the pleasure of information. The examination upon the Institutes, and the Thesis of Bachelors became occasions of public resort; and the zeal of *Pothier* was always perfectly seconded by that of the other professors.

During the course of five and twenty years how many ornaments has this seminary presented to the magistracy and the bar.

After completing his great work on the Pandects, *Pothier* entered on an immense career which only terminated with his life. He had formerly composed treatises for his own private use upon all the subjects of *French* law. The duty of instruction led him to go over them anew; and those treatises are in manuscript in the hands of several persons. He would have retouched them still farther if he could have found time to have attended to their publication.

In 1740, *Pothier* had, in conjunction with *M. Prévôt de la Janès*, and *M. Pouffe*, published an edition of the custom of *Orleans*, with notes. This edition being out of print, and the bookseller being desirous of another, he requested *Pothier* to revise it. He undertook the charge with pleasure, but instead of a mere revision he produced a work entirely different, and much more important and useful. At the head of each custom he added a summary treatise on the subject: a kind of commentary infinitely more useful than notes; which being only relative to a single article, give the mind no connected view, and are as detached as the text which they interpret. He subjoined notes to the articles requiring elucidation,
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and there are constant references from the notes to the introduction of the title, and from the introduction to the body and notes, connecting the whole work together. Obligated to restrain himself by the limited nature of his subject, he has adapted his style accordingly; so that this work presents an excellent abridgment of his treatises. It contains every thing which it is essential to know, stated with neatness and precision; and whoever has these two volumes may attain an adequate knowledge of customary law.

This work is not less valuable with respect to the custom of *Paris* than to our own, from the great affinity subsisting between them, and it forms a complete body of customary jurisprudence, the more valuable as coming from a civilian. For it must not be supposed that the customary law is entirely separate from the *Roman*, and that a mere knowledge of the customs is sufficient for composing a treatise upon the subjects which they embrace.

In our legislation, which is almost entirely positive and arbitrary; reason has scarcely any influence in the establishment of principles. The customs of different provinces may be contradictory, and in fact often are so, and yet they are all true. For whatever is arbitrary is only a single matter of fact; and cannot in its nature be a substantive and independent truth. There are doubtless many of these detached truths or factitious principles, in all legislation; for matters of detail can only be regulated by positive law. Unfortunately our legislation is so full of them as hardly to contain any thing else; and those positive laws which would be no longer arbitrary, if they were founded upon any reasons of real necessity or utility, are for the most part arbitrary in the strictest sense of the term. But the jurist, like the magistrate, makes no alteration in the laws; he only teaches or explains them as he finds them established, and he reasons justly upon these arbitrary principles when he deduces from them their proper consequences; when he correctly distinguishes between the opposite interests which arise from their interpretation, and applies in a skilful and judicious manner, the superior rules of true distributive justice to their construction. He unquestionably enjoys a greater satisfaction when he is directly engaged in the application of these rules themselves, and in investigating the pure principles of natural right, the adaptation of which to the multiplicity of actions, and the various relations of society, is already so extensive. But since to these laws, at once so simple in themselves, and so fertile in their consequences, so many others have been added which are merely arbitrary, it becomes requisite to study the laws last mentioned, in order to regulate the various interests and actions which depend upon them. But what a differ-

ence is there when these matters, however consistent with the real principles of justice, are treated of by a person who, never having studied any thing else, plods servilely within the narrow circle of human institution, and by a jurist who, possessing the powers of taking a wider range, respects this legislation because it exists, but who avails himself of the spirit of decision, and the extended views which the science of jurisprudence supplies for the discussion and interpretation of positive law.

Such, in an eminent degree, was the talent of *Dumoulin*, who applied in so superior a manner the wisdom and intelligence of the *Roman* law, to the explication of our own municipal usages; such was the talent of *Loyseau*, of our commentator *Lalande*, and a very few others, who may be selected from the crowd of practitioners and commentators by which we are overwhelmed.

Such was the talent of *Pothier*, and it is this circumstance which has so greatly enhanced the merit of his researches upon customary law; and which excites our regret for his want of leisure to publish all that he had composed upon these subjects. But almost every man of science has excited the same regret. In the sciences, and especially in those which require a very extensive study, the greater part of life is employed in acquiring the knowledge requisite for communicating instruction; and there is not afterwards sufficient time for the execution of all the plans which are projected. Genius and learning inspire resolution, and produce designs, which are obstructed by the shortness of life. If we were to dwell too intently upon this circumstance, we should fall into languor and inaction, and we should not even attempt what is actually in our power, unless we were instigated by the hope of accomplishing what is beyond it.

Pothier would have found sufficient time for satisfying every wish with respect to customary law, if he had not engaged in another work, which was attended with the most happy consequences. He undertook to compose a treatise in *French* upon a subject the most important, and of the most necessary and frequent application of any in the science of jurisprudence, and the principles of which can only be collected from the *Pandects*—the substance of obligations and contracts, intermixing some discussions confined to the particular laws of *France*.

He published in 1761, the *Treatise on Obligations* in two volumes, as the foundation of the other treatises which he intended afterwards to present. This work had the most favourable reception, and has passed through two editions. It will always be regarded as a classical and essential production. It engaged the greatest share of the author's application, and required the most profound

profound and extensive knowledge of jurisprudence. He discussed with equal penetration and perspicuity, the principles respecting the divisibility and indivisibility of obligations ; a matter extremely subtle, and which had been developed by *Dumoulin* in a particular work of great learning, but very difficult of comprehension. The subject required a precision and method which were wanting in *Dumoulin*, whose profundity of learning seemed injurious to his perspicuity.

The Treatise on Obligations announced a connected series of dissertations upon the different species of contracts. The author fulfilled this engagement. Every year produced a new work. We are ignorant what he projected further ; but it is probable that he would have given the public his works on *French* law.

His Treatises on Contracts have the advantage, of not only embracing the knowledge of the civil law, and the application of its principles to the cases which occur in courts of justice ; but likewise of affording the surest directions upon matters of conscience. The subjects are discussed with reference both to legal and moral obligation ; and while he gives us information how the rights resulting from our contracts can be judicially enforced ; he teaches us to be just, to forbear demanding any thing inconsistent with equity, and to abstain from violating the rights of others, even when it can be attempted with success ; a most valuable part of jurisprudence, which constitutes the essence of morality, and is of much greater extent and exactness than can be attained by any judicial determinations.

Jurists alone can hold that balance of immutable justice, of which human justice presents no more than a faint shadow and an inanimate resemblance ; it is for them alone to ascend a tribunal superior to those which can be erected by human authority, and to pronounce with rectitude upon the rights and duties of mankind.

This part of ethics is, doubtless, likewise within the province of theologians, and they ought to have a knowledge of it, but their information should be received from jurists. Let them not be ashamed of consulting the *Roman* laws : they will there find upon almost every subject, pure, exact, and luminous decisions, without the knowledge of which it would be difficult to instruct persons as to the direction of their conduct, without incurring the risque either of misleading them by erroneous decisions in favour of their own interest, which is always too ready in illuding the dictates of integrity ; or of alarming and disturbing their consciences by too severe restrictions. On this account, *Pothier* did not like to see matters of right discussed by theologians or casuists, and upon

these points, he frequently confuted the author of the conferences of *Paris*, who in other respects possesses very great excellence. They ought to feel the obligation which he has conferred upon them, by enabling them to apply the principles of justice to the infinite variety of cases arising from agreements; and can have no just apprehension of being mistaken in following the decision of a person of such enlightened understanding.

The style of *Pothier* is simple, easy, and for the most part rather negligent. It accorded with his character, which was totally destitute of affectation and parade; but at the same time, it is extremely accurate, and cannot be charged with being too diffuse; an advantage which is superior to any other in works, that are read only for the purposes of instruction, and the want of which cannot admit of any compensation.

His modesty induced him to say, that he wrote only for the use of his scholars. Some journalists, who were better qualified to judge of the frivolous publications of the day, than to appreciate the value of juridical enquiries, confining themselves to this superficial view, and deciding upon the intrinsic merit merely by this simplicity of the style, did not hesitate to repeat the judgment which the modesty of the author had pronounced. But the force of truth will always obtain from those, who are competent to form an adequate judgment, the sentence that his treatises upon contracts are not only calculated for teaching the rudiments of jurisprudence; but that the most accomplished jurists will read them with advantage, as containing a perfect representation of their science, and that the treatise on obligations is a work of the most distinguished excellence.

Pothier himself admitted, that he wrote without any regard to style. He attended only to the matter, and expressed his ideas as he first conceived them. But as he had a very correct mind, his ideas always presented themselves with proper order, and fell into a regular arrangement. His plan comprised his whole subject, his definitions are always exact, his divisions clear and methodical; his reasons for doubting and deciding are placed in a luminous point of view, and the solution finds the reader instructed by the discussion, and prepared to acquiesce in the justness of the decision. He more than once did me the honour to submit his manuscripts to my revision, for the purpose of correcting any negligence, or prolixity: I undertook this commission whenever he requested it; my remarks were neither numerous nor of much importance, notwithstanding the liberty which he gave me, or rather notwithstanding my wish to please him by paying the attention which he desired. I felt, that if I had composed the work, I should have written otherwise

in general, because every person has his peculiar manner of writing; but if I offered to polish the style, or to present the questions in a different manner, I perceived that it would be necessary to new model the whole, and that the style was the result of the substance, so that it could hardly ever be changed without a loss of perspicuity. The same thing was experienced by some others, to whom he gave a similar commission.

In jurisprudence as in medicine, the theory of the science acquired by study, cannot be carried into effect without the habits of practice. *Pothier* was equally a master of this part of the subject, and although the forms of procedure are very tiresome to a scientific jurist, he conquered the aversion to them; and has left manuscript treatises on civil and criminal proceedings*.

To the acquisition of such extensive knowledge, he united all the excellencies of a magistrate in a superior degree. Zeal for the support of justice, assiduity, promptitude, and dispatch, disinterestedness, integrity, firmness, attachment to his fraternity, nor was there any virtue incident to his station, which he did not possess in an eminent manner.

He had great satisfaction in finding his tribunal surrounded by the pupils whom he had taken by the hand to lead there, whom he had formed by his lessons, and whom he continued to instruct by his counsels and examples. None of them could complain of his using that tone of superiority, which his age and merit might have reasonably allowed.

What precision, what perspicuity, prevailed in his reports! Without going into useless details, he retrenched the extrinsic matter which is often introduced by the parties, and only presented the cause itself, and the grounds of argument on the respective sides.

In the judgment of criminal affairs, there is less room for the science of a jurist. The object of enquiry is only the proof of a fact. But what attention, what justness of mind, especially upon delicate occasions, is requisite in weighing the indicia and circumstances, in distinguishing the degrees of probability, in avoiding to confound it with certainty, and in drawing the line between moral certainty and judicial?

Pothier evinced an equal justice and penetration in this part of his duty. He was equally adapted to all the functions of magistracy, and completely fulfilled them. Care was only taken to avoid assigning to him cases, in which it was foreseen that the question† might be directed, as he could not support the spectacle; a weak-

* These are now printed with his works.

† Torture.

ness which proceeds more from the sensibility of the physical organs, than from moral sentiment. In other respects, he did not decline any of the functions of magistracy; with which, towards the end of his life, he was very much engaged, in consequence of the death of the other magistrates.

The *Presidial* of *Orleans* is indebted to him for its re-establishment. Had it not been for the emulation which he excited, and the persons whom he induced to embrace the magistracy, the company would have now consisted only of a few ancient members: whereas the last twenty years have been its most brilliant epocha, rendering it a single exception amidst the general decline of tribunals. But can we flatter ourselves, that this generation will be replaced? Can we expect that this partial cause will be attended with permanent consequences, and produce an exception from the more general causes, which are occasioning the second order of magistracy to fall into decay? I stated the causes of their decline in a public discourse in the year 1763. They certainly have not diminished since that time; and the great man who, in this district, repressed the influence of causes that have been so powerful in every other, who singly sustained the credit of his tribunal when it was on the verge of ruin, who so greatly extended its splendour and utility, is now no more, and it is certain that he will not be replaced.

Should there hereafter arise any other person equally great as a jurist, (to the formation of which character his works may essentially contribute,) where will the man be found who to his depth of knowledge, his justness and penetration, will join in an equal degree the qualities of the heart; a man so good, of such simplicity, so modest, in every way so respectable? He seemed out of his place among us by the purity and simplicity of his manners, which were entirely remote from the fashions of the times.

It would be much easier to give an account of his works, than an idea of his virtues; and this part of his panegyric which yet remains, will appear very imperfect to those who had the happiness of enjoying his intimacy, and the example of his private life.

SECOND PART.

THE life of a man of science is seldom very fertile in events, which are calculated to interest our curiosity. Simplicity and uniformity are its character, and its only æras are those of his works.

His history is like that of a nation, whose government has been long exempt from ambition, friendly to peace, solely occupied with the care of rendering its subjects happy, and enlightened in the means of doing so. The annals of such a people will be very barren; when you have learned its constitution and administration, you know its history; it will be the same in one age as in another, because the character of order is uniformity.

The agitation of the passions is the cause of events, and history is only the recital of the effects produced. The life of a man of science is the more happy, as it is the less replete with interesting occurrences.

Sometimes he is carried against his inclinations amidst the storms of life, to which he is naturally a stranger. Circumstances remove him from his proper sphere, and subject him to the passions of others, or raise him to situations which expose him to their contradiction. His life then becomes interesting at the expence of his repose.

Pothier had never any ground of complaint from the passions of himself or others. Nothing disturbed the tranquillity of his mind, no adventitious circumstances deranged the plan and uniformity of his life. Nothing occurred to give him pain except the loss of his friends, to whom he was attached with great sincerity.

Perfectly free from all pecuniary anxiety, he consecrated the whole of his life to his functions, and the study of jurisprudence; he had no other duties to fulfil, nor any other inclination to gratify.

He never had the smallest disposition to marry. He said that he had not sufficient courage for it, and that he admired those who had.

Celibacy is doubtless the best and wisest course for a man frugal of his time, exclusively devoted to study, and peculiarly anxious for tranquillity. This condition separates him from the generality of mankind, it secures him from many evils, and, by limiting the objects of his attachment, relieves him from the principal sources of anxiety.

No person ever availed himself of this advantage more than *Pothier*; he wished to enjoy it in its full extent, and thought himself excused from all attention to domestic affairs. His negligence in this respect would have been culpable in the head of a family. The fault in him became respectable from the motive which occasioned it. It originated from a sincere disregard for affluence, and a most disinterested character of mind. He, however, saw

only the negligence that was produced by this sentiment, and reproached himself for it in the society of his friends.

He was appointed *Echevin** in 1747. We must take the liberty of observing, that this appointment was rather inconsiderate. Why should it be wished to have a person, whose time is so valuable, devote a portion of it to functions, which would be much better performed by others? Why compel a person, to whom the care of his own patrimony was too burthensome, to charge himself with the pecuniary affairs of the public? he therefore attended very little to the duties of this employment.

He was no wise calculated for the details of domestic affairs, he was too indifferent to matters of interest, to study or attend to them. Fortunately he had a faithful domestic, who obliged him to undertake the most essential concerns, and relieved him from attending to those which did not require his personal interposition.

He never attempted to increase his fortune, and only left it as he found it. His disinterestedness was not occasioned by the affluence of his fortune, which was more than sufficient for all his purposes; but proceeded from the nature of his character, and from a real indifference for riches.

If he had been much more opulent, he would not have lived in a different manner, he would have made much larger donations, and would have been more incumbered by a more extensive fortune, in case he had condescended to take the trouble of giving it an additional attention. If he had consented to take more pains, it would only have been from a motive of economy in favour of the poor. He preferred indemnifying them by the frugality of his life, by which he was enabled to be more generous than his fortune would seem to allow. He was justified in thinking, that he discharged his duty towards them by the disposition of a superfluity, which was the more considerable, as what he applied in necessaries was very limited. He regretted even the amount which his domestics expended in these necessaries on account of his health, and they sometimes found it requisite to conceal from him the price which they gave for provisions. The *Dames de Pauvres* were always sure of finding a resource in him; he received their visits with gratitude and respect, he was pleased with making them the depositaries of his bounty, because he wished it to be applied with discretion; and by confiding it to them, he was easy with respect to the distribution, and did not think it requisite to ask for any account.

* An officer who has the charge of the pecuniary affairs of a town.

But how many persons, whose indigence was accompanied by a certain elevation in society, applied to him with confidence for assistance, and received an effectual relief, the value of which was enhanced by the tenderness with which it was administered? How many children did he put forward in life, by defraying the charge of their apprenticeship; a relief the more durable, as it prevents the accession of poverty? How often have distant provinces experienced the benefit of his charities, for which there was no other solicitation than a knowledge of the miseries that excited them?

How many good works did he perform in secret, and which were known only to omniscience? In times of general calamity, he would have exhausted the whole of his income, and left himself destitute of necessaries, if his superintendant had not taken the precaution of reserving something for daily expenditure; he concealed his money from her for the purpose of charity, and she was obliged to conceal it from him for mere subsistence. This did not require very great management, as he never knew the amount of his money, and gave her his key whenever she asked for it. As long as he found any money he took it to give away, and she could only check this excess, by threatening to take up goods upon credit. When his coffer was exhausted, the replenishing it was also the care of his superintendant; she was obliged to discover where money was due to him, and prevailed upon him to sign receipts to enable her to obtain it.

So many virtues and good works were concealed from the knowledge of the public by an extreme modesty, and the same disposition so entirely influenced all his actions, that it was the virtue which he had the greatest difficulty in concealing. It arose from a sincere humility, by which he really preferred others to himself, and prevented his conceiving himself to be possessed of a merit, which was conspicuous to every other person.

Equally disinterested with respect to reputation and fortune, he took no more pains for the one than the other; but there was this difference, that he never did any thing which had the effect of advancing his fortune, whilst every day was adding to his reputation, which extended without his knowledge, and contrary to his wishes, and any intimation of it was by no means favourably received. He was as much averse to commendation as others are to reproach, and it was easy to observe by his embarrassment and his countenance, that he was seriously displeased with it.

To be indulgent to others, to be afraid of failing in what is due to them; to forbear exacting any thing for ourselves, is the true character of politeness; and this politeness was as prevalent in his character

character, as the modesty which occasioned it. He was only deficient in that superficial politeness, with which the generality of persons are fully satisfied, and which they so frequently pervert by expressing sentiments that they do not feel; he was deficient in the manners which are only acquired in the commerce of the world, and which are dispensed with in persons who have been more conversant with books than society, especially when they have nothing of that coarseness and asperity, which are sometimes contracted by a habit of study and retirement, without themselves being conscious of it.

Pothier's deportment was very different from this. Nothing could be imputed to him but an excess of diffidence, which rendered him timid and embarrassed in the company of strangers; or when he was forced by the duties of propriety to appear in a more extended circle. Upon these occasions he found himself out of his element, and generally requested one of his friends to accompany him, which he regarded as a signal favour.

Nature is frugal of her gifts, and does not always impart a variety of them to the same individual; but who would not prefer the allotment of *Pothier*, however destitute of exterior advantages? There was nothing prepossessing in his figure; his stature was tall, but ill connected; in walking, his body inclined on one side, his gait was singular and inelegant; in sitting, he was embarrassed by the length of his legs, which he kept twisted together, (*entrelassoit par des contours redoublés.*) There was a peculiar awkwardness in all his actions: at table it was almost necessary to cut his meat for him; if he wanted to mend the fire he placed himself upon his knees, but did not succeed in accomplishing his purpose. The simplicity of his manners, and of his whole appearance, might excite a favourable impression with respect to the goodness of his character; but gave no indication of the superiority of his mind. To have an idea of that, it was necessary either to judge of him by his reputation, or to have an intimate knowledge of him; a transient visit must have weakened the idea that was previously entertained of him. There was, however, a spirit and vivacity in his eyes, which indicated the quickness of his penetration; but they did not acquire animation until he became interested by the conversation.

He was always the readiest to indulge a pleasantry upon his own figure and want of address. He used to relate in a good humoured manner, that in passing a coffee house at *Paris*, in his robe, the young men came out to point at him.

When he was at *Paris*, upon the invitation of *M. D'Aguesseau*, who wished to know and converse with him upon the work in
which

which he was engaged, he called at the *Hotel de la Chancellerie*, and was told that the *Chancellor* could not be seen. He went away, and intended to return home the following day, if his friends had not detained him. He called again the next day, when the *Chancellor*, upon being informed that he was in his anti-chamber, came out to him, and received him with a distinction, which afforded considerable surprise to those who had only formed a judgment of him from his appearance.

He was mild and affable in society, gay and open with his friends, of a frankness in conversation that unboomed all his thoughts, his tranquillity was never disturbed, nor his serenity overclouded. He had a simplicity which it is pleasing to meet with in men of superior minds, as it tends to moderate the awe inspired by their merit. This simplicity would sometimes have the appearance of singularity, sometimes it was the result of an excess of reason, if we may use that expression to distinguish it from the ordinary mode of thinking and acting. For even the most sensible persons in many cases follow the common opinion, in opposition to the dictates of good sense; and it is very rare to meet with a person, whose opinions, being solely governed by the pure sentiments of reason, cannot appear otherwise than singular.

He was averse to contention and dispute, was never personally offended with contradiction, and wondered at any person being displeased at another differing from him in opinion. But he strongly adhered to his opinion, not from an attachment to it as his own, but because he thought it correct, and the extent of his information would not suffer him to remain undecided. He defended it with firmness, and used a freedom of opposition, which he equally admitted to others; he argued with living persons in the same manner as he discussed the sentiments of an author, without feeling any other interest than the discovery of the truth. Authority alone did not impose upon him, because it is not a reason, it was only an additional motive for discussing a subject with greater care, and giving his reasons a force and clearness, which might counterbalance the weight of authority.

There was, therefore, a great advantage to be gained from stating objections to him, and entering into disputation with him. The attack excited him to relinquish his accustomed tranquillity, it forced him to resume the consideration of the question, to discuss it in all its aspects, to weigh the opposite arguments, and to establish his sentiment with a fullness, and an energy peculiar to himself.

But when he really felt an interest in a proceeding or an opinion,

opinion, (and what interest could affect him but that of truth, of justice, of public utility?) his modesty and the mildness of his character did not prevent his maintaining his sentiment with a considerable degree of warmth and vivacity. If he was strongly contradicted upon these occasions, he would sometimes forget his moderation, become animated and irritated by resistance. The words then pressed upon him for utterance, and he could not express at once all that he wanted to say; and from his wish to persuade, he enfeebled the powers of persuasion, which naturally belonged to him. A harshness of expression would sometimes escape him that his heart would have disavowed; and which was certainly not instigated by any acrimony of sentiment; and which the zeal that incited it would have excused, if people were not ordinarily more sensible to exterior effects, than to the motives producing them, which is so far reasonable that they can only form a judgment of the latter from the former. Whoever had seen him at these moments, would have thought him eager for victory, susceptible of resentment, and no wise averse to exciting it in others; but the judgment formed upon these impressions would have been very erroneous. No man was ever more simple, more mild, more devoted to peace, more remote from animosity. He never had occasion to pardon; for pardon supposes offence, which he was incapable of feeling. A failure in the attention that was due to him could not irritate his disposition; and he was still less susceptible of hatred than of anger. His reason, as well as his religion, would have precluded it from entering into his heart; and it may be added that it was equally impossible to conceive a hatred against him, or even to feel a coldness towards him.

His zeal and ardour upon these occasions were as great as his indifference with respect to matters of etiquette and ceremony, or the pretensions and interests of his company.

This manner of thinking and judging arose from the principles of his character, which was naturally inimical to contention, upon subjects that did not appear worthy of it. He supposed all other persons to have as much simplicity as himself, to be equally replete with that reason which rises above exterior circumstances, and equally indifferent with respect to what only concerns the manner of things, without having any relation to their substance.

To this mode of thinking, and to the openness of his character, we may attribute his custom of expressing his opinion aloud at the audience. Scarcely had an advocate opened a cause before he became master of it; he anticipated all the arguments of the
respective

respective parties, and had formed a judgment within himself almost before the bar could perceive what was the matter in dispute. He had afterwards only to observe the manner in which the case was supported and defended. If it was a cause of slight importance, he allowed his mind to amuse itself with other subjects; if he exercised his attention, he could scarcely avoid intimating his concurrence or dissent by his gestures, or by a half utterance, so that his opinion was known well enough previous to going to consultation.

But he allowed himself much greater liberty when he presided. The fondness for dispatch, which is confessedly laudable, but which ought to be kept within proper limits, carried him away, and made him forget the patience that is proper for a judge, and is due to the parties. The party that fails in a contest ought not to have the opportunity of complaining that he has not been heard. Nobody will ever accuse *Pothier* of entertaining a wish to dictate the judgment and concentrate the whole authority of the tribunal in himself: his real disposition was too well known for even malignity to infer from these outward appearances, that he was actuated by any personal consideration. But he wished for expedition, and in causes of small importance he did not think that it was possible to proceed too rapidly. If the advocates wandered from the point in question, he was in haste to bring them back to it; but if they advanced an improper argument, or maintained a false principle, he could not command his impatience, and interrupted them for the purpose of fixing them to the true principles and arguments of the cause. The audience sometimes degenerated into dissertations and a kind of conference. His friends sometimes remonstrated with him upon the subject, which he approved, but he was not master of his conduct. In any other person this manner of presiding would have appeared at least singular. But he was so respected, and so remote from all intention of giving offence, that every thing coming from him was assented to.

These details may perhaps not be considered as misplaced on the present occasion. We have a pleasure in knowing even the slight faults of illustrious persons, perhaps because it seems to place them more nearly upon a level with ourselves; perhaps also because these trifling defects commonly accompany an excellence of disposition, and are only the too prominent consequences of it. They are calculated to depict the man as he was, and to give a more familiar representation of his character.

It is a great advantage, especially in the sciences which require continual assiduity, and for which human life is always too short, to be disengaged from any foreign pursuit that cannot be followed
without

without injury to the principal object ; and there is much merit in resisting the wish for extensive erudition ; especially when it is flattered by the facility of success. *Pothier* might without neglecting jurisprudence, have been allured by some particular study, and applied himself to it in the vacations. He had certainly been attached to mathematics and literature, and had already sufficient knowledge of them to afford an inducement to extend it. He had formerly studied geometry, which, although originally incapable of producing an accuracy of judgment, is so well calculated to bring it to perfection. He had likewise an inclination and taste for literature ; but having acquired sufficient for the purposes of utility, he could only increase his stock of it by way of relaxation, for which he never found sufficient leisure.

The study to which he most devoted himself for the first ten or twelve years of his magistracy, was religion. He endeavoured to enlighten his faith and to advance his piety. His attachment to religion arose from an intimate conviction, founded upon a knowledge of its evidences, and strengthened by the love and practice of its precepts. With what contempt therefore did he regard the new philosophers. He could never speak of them without indignation. He bewailed the progress of infidelity and the corruption of morals, which is the effect of it.

We lament the shortness of his life, we regret that he had not time to complete so many other treatises which he had projected. Could he have accomplished those which we have if he had applied himself to extraneous pursuits ? It was only by a rigorous economy of his time, in conjunction with his facility and penetration, that he could be equal to the performance of so many different occupations.

Nothing can be more admirable, since nothing is more rare than the discretion and moderation, which he used in the labours of composition. That kind of labour which is the most pleasant and flattering, easily obtains a preference. A man of science is impatient under the pressure of occupations that divert him from his favourite employment, and avoids them as much as possible. *Pothier* might very easily have conceived, that the publication of his works was a benefit of more permanent utility, than so many other services which he rendered the public, and have deemed this preference a sufficient excuse for neglecting his other duties.

We may entertain the same opinion ; and regret the time which was so meritoriously employed, but of which no traces remain. He, however, could not have thought or acted in such a manner, without ascribing to his works a greater importance than his modesty would have allowed.

Besides,

Besides, he made it a principle to reconcile all his duties with each other. Sparing of his time with regard to recreation, he was prodigal of it for the purposes of utility; and never evinced a greater partiality for one avocation than another. No person was more assiduous in his attendance at the court; and he never omitted his lectures. Upon retiring to his study, he examined the procedures on which he was to report; received visits which are often made without any necessity, with a patience very uncommon in a person so much engaged; he gave advice and answered letters, the number of which increased as his reputation extended: how many litigations has he prevented by the prudence of his counsels! how many family contests has he terminated by an amicable arrangement! the confidence of the public rendered him a voluntary tribunal.

Although he devoted a large portion of the day to employment, it was often fully occupied without admitting any parts of it to be allotted to composition. He had a talent of leaving an employment and resuming it with equal facility. He always quitted it without fatigue; because his moderation extended even to his studies, which he never continued during the night. His supper, which he took at seven, closed the labours of the day. This plan was only deviated from on Wednesdays, when he deferred the hour of supper until eight; on account of a conference which he had with all the young magistrates, and with several advocates, whose pride it was to have been and to continue his pupils. These conferences were continued without interruption for more than forty years. They were at first held at the house of *M. Prevot de Janés*, and upon his decease *Pothier* had them at his own.

In the course of a life thus occupied, a short journey to *Rouen* and *Havre* in 1748 was almost the only voluntary interruption of his regular pursuits. He had always entertained a wish to behold the sea, for he was not indifferent to the contemplation of nature; and a view of the immensity of the ocean to those who have not been accustomed to it is truly impressive, as bespeaking the greatness of him who formed that repository for the formidable element, and assigned it its proper bounds. On his return from *Havre* he remained some time at *Paris* with *M. Guyenne*, for the purpose of conferring with him respecting his edition of the pandects. I had the honour of being his companion upon this journey. *M. l'Huillier*, *lieutenant particulier*, was also of the party; I was then in my first year of law, and the journey was no interruption to my study, I had the institutes with me, and the best commentary possible was the conversation of *Pothier*, who explained them to me.

While

While he was engaged in the composition of his great work, he was obliged, for the purpose of avoiding interruption in it, to withdraw in some degree from his other occupations. This was previous to his having the appointment of professor.

He went to pass a part of the summer at *Lu*, where he had the advantage of repose and solitude.

After obtaining the professorship in 1750, he only went there during the vacation; and the time which is usually allotted, even by the most assiduous, to relaxation, was that in which he was the most fully occupied, as he was then least subject to interruption. From *Lu* in a great degree proceeded his various treatises. He always had a horse there and was fond of riding. It is easy to form an idea of his appearance on horseback. His rides consisted in going every *Sunday* to mass at *St. Andrew de Chateaudun*, and paying visits to his friends, among whom were several of his colleagues, but he never slept from home.

Orleans ranked at the same time among her citizens two men of rare and equal excellence in different kinds, and for thirty years these two, each worthy of the other, resided together in the small mansion of *Lu*.

At the age of 88 *M. Pichart* (*Canon of St. Aignan*) still laments the loss of one whom he had not expected to survive, or rather tranquil as to the lot of his friend, he only deploras the misfortune of the public. As profound in the knowledge of the holy scriptures, as *Pothier* was in the science of the law, he was employed on those learned commentaries on the sacred books which are equally replete with genuine piety, and valuable information. Their relaxations consisted in a walk of an hour after dinner, and a conversation of the same length after supper; for *Pothier* breakfasted too early to have the company of his friend at that time. It may readily be conceived that their conversation would have considerable interest: *Pothier*, although commonly silent, was otherwise upon subjects adapted to his inclination, and he always found in *M. Pichart* a great facility of speech, and an extensive fund of literature, both sacred and profane. He had sufficient knowledge to support a conversation upon the subjects which were familiar to *M. Pichart*, and the field was sufficiently large for their amusement. But he also wished to converse with him respecting the Roman law, and spoke in such high terms of the pandects, that his friend could not forbear reading them; it is superfluous to ask whether he was satisfied with having done so.

The reputation of *Pothier* was necessarily extended with the diffusion of his works; and he had during the course of his life all the celebrity which a man of science can enjoy. The voice of
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the public acknowledged him as the greatest jurist of his age, or rather as the greatest since the time of *Dumoulin*, with whom he was frequently classed. Without waiting for his death, the weight of authority was given to his decisions, and the highest tribunals have acted upon the citation of his works; an honour above suspicion, and the greatest which a jurist can receive.

This sentiment prevailed not only in *France*, but amongst foreigners, by whom he was as much esteemed as by his countrymen. His, indeed, are not works the utility of which is confined to any given space. Wherever the science of jurisprudence shall be known and cultivated; wherever men shall engage in contracts, and have occasion to appeal to the principles of justice for deciding the controversies that may arise from them; the name of *Pothier* will be known; his works will be studied and consulted. The authority of so illustrious a jurist is properly that of a legislator; or rather surpasses it, in as much as it participates in the laws of justice; and as these immutable laws which are adapted to all mankind are superior to the versatile, transitory, and arbitrary dispositions which men have been pleased to erect into laws.

If *Pothier* had only applied his assiduity to the municipal and particular laws of his own country, his reputation would have been confined to the same limits; but he is a jurist for all times and all places; he is likely to have even greater celebrity in countries where jurisprudence is cultivated with attention, than in *France* where it is so much neglected, where places are purchased, and the price which is given for them is a dispensation from study and from learning. And we may even add, that if he was a stranger to his country, by the simplicity of his manners, he was still more so by the course of his studies.

If he had been born in *Germany*, the princes there would have disputed which of them should have attached him to their court, and those who could not fix him with themselves, would have felt a pride in distinguishing him by titles of honour. With us he lived as the most ordinary person, and without receiving any distinction. He was himself very far from either desiring or supposing that he deserved any. But it seems surprising that no steps were taken, for discharging the obligations which were due to him from the country, by conferring some distinction that would reflect a greater honour upon those who procured such a reward for modest merit, than upon him who received it.

It is equally astonishing, that as his excellence was so well known, he was never consulted upon subjects of legislation; and that his talents were never resorted to for the reformation of the laws.

He would have been the soul of a council of legislation. But, by a singular fatality, the existence of merit is less rare than the employment of it in its proper sphere.

It is not for us to complain of this neglect, or to regret that his merit was not raised to a more suitable elevation. We possessed him to ourselves, in prejudice of the general utility that would have arisen from his exertions, if the functions of a magistrate and professor, if the many private benefits that we incessantly received from him had not occupied the whole of his life. Every citizen had the benefit of his counsels, for from whom did he ever withhold his information? Every man of worth could name him as his friend. The poor deplore him as their father. His gentleness and propriety attracted a universal attachment and respect. It is not every one who can appreciate the excellence of the jurist; but the heart is the most essential portion of the man, and of that perhaps the people are the surest judges.

His death was therefore a general grief. The public are not always just; their view of the worth which is before them is sometimes dimmed; prone rather to criticism than to admiration, frugal of their esteem, and dealing it out with caution and restriction; they cannot agree to render justice to merit, until it has departed from them. But the charge cannot be applied to the character of *Pothier*; death has only confirmed the sentiments of the public, without augmenting them, which is the most exalted panegyric, and the most perfect proof of exalted and untarnished merit.

However extended the life of such a man may be, his death when it occurs is to the public premature. The death of *Pothier*, appeared the more so as from his age, which was only 73, and the regularity of his life, a much longer duration of it might have been hoped for. To himself it would have been sudden if the whole of his life had not been a continued preparation for it. He had experienced neither the infirmities of an advanced period of life, nor the decay of old age; no weakness of intellectual faculties, no bodily pains, none of those apprehensions of the approach of death, from which even the most pious life is not always a protection.

He was snatched away by an illness of six days. The fever, although severe, had not the appearance of danger; on the first of *March* he felt himself better and got up. He was supposed to be recovering, and he entertained the same opinion. In the evening he fell into a lethargy, and on the following day he terminated a life so precious in the eyes of God and man.

INTRODUCTION.

PART I.

THE science of jurisprudence, although one of the most important and interesting, which can occupy the human understanding, has not been distinguished by an attention proportionate to its intrinsic excellence. It has been too generally estimated as a mere collection of positive rules, the knowledge of which was no otherwise desirable than as it might be conducive to immediate interest or security, or of technical forms, the instruments of professional employment. Even those whose avocations have given them the opportunity of correcting so palpable an error, have too frequently acted upon the same impression, and limited their regards of law as a science to the practice of it as an art.

Jurisprudence is by the ablest writers regarded as a moral science; and any controversy which may arise with respect to the propriety of the term, must be verbal and unimportant. It certainly is a science which regards the conduct of men in a state of society; but which regards it under a particular aspect. Morality, so far as relates to its obligatory character, is founded upon an individual sentiment of rectitude and propriety; jurisprudence is referable to a rule of conduct maintained by coercive authority: the effect of jurisprudence is to maintain and define an extensive portion, but only a portion of the duties enjoined by the principle of morality; while it is one of the attributes of morality to conform to the more positive precepts of jurisprudence.

The definition of jurisprudence, which is contained in the preliminary title of the institutes, as being the knowledge of things human and divine, the science of what is just and unjust. "*Divinarum atque humanarum rerum notitia, justæ atque injustæ scientia,*" has, so far as relates to the first member of it, been the source of considerable altercation between the jurists and philosophers: the latter claiming it as their own exclusive attribute,

whereas the former, who ascribed to themselves the study of true and not of false philosophy, applied the definition which the stoics had before given to philosophy, to the science of jurisprudence.

Heineccius has a particular dissertation upon the contest arising from this definition, in the result of which he concurs with what had been before observed by his master *Vinnius*, that it was not intended to assert generally, that a knowledge of all things human and divine, was included in the science of jurisprudence, but that the first part of the definition was explained and qualified by the last, and that the meaning of the whole is such a knowledge of things human and divine, as relates to what is just and unjust.

Perhaps the object and purpose of the definition was not very fully considered, at the time of its being applied, (for in every step of the preliminary title above referred to, we meet with terms and definitions which have a character very opposite to that of mathematical precision.) It is perfectly clear, that a considerable portion of general science is requisite to the practice of law and administration of justice in any extensive degree, and that a mere acquaintance with the particular rules and institutes of his own profession, will be a very inadequate foundation for the character of a perfect lawyer: for, independent of those principles of reasoning, which from particular cases can elicit a general principle, and having discovered the principle, can trace the consequences of it, independent of the application of the rules arising from the common principles of justice and equity, it is manifest that, except in certain limited departments, the objects of enquiry relate much more to particular circumstances of fact, than to any dispute respecting the rules of law; and a day's attendance at Guildhall, or the sittings of Westminster, will shew the great diversity of subjects, upon which some degree of previous knowledge is essentially requisite, as the course of trade, the common occurrences of society; the question of sanity or insanity, and not to mention other particulars, the whole class of cases which turn upon the charge of negligence in any occupation or employment, but the actual pursuit of all the minute ramifications of particular knowledge would be in itself impossible, and would prevent an adequate attention to studies of a more imperious nature. The leading rule upon this subject therefore appears to be, to acquire such a general habit of attention and observation, as will facilitate the powers of perception upon any particular subject; and whilst an absolute acquisition of that extensive knowledge, which may be at all times adequate to the purposes of professional utility, is admitted to be unattainable, the cultivation of as large a portion of it as circumstances

circumstances and opportunities will allow, is very strongly to be recommended and enforced, a very considerable portion being essentially requisite to the attainment of any useful and honourable degree of professional eminence.

But though the definition of *Ulpian* inculcates a very useful precept, that of *Heineccius*, as being the practical habit of rightly interpreting laws, and duly applying them to particular cases—*Habitus practicus, leges recte interpretandi, adplicandique rite quibusvis speciebus occurrentibus*—is much more accurate and precise.

If I may be admitted to suggest a definition of my own, I would, in the first place, speak of general jurisprudence, as that science which regards the rights and obligations of individuals in a state of society, as they are capable of being protected and enforced by judicial authority; and of particular jurisprudence, as a knowledge of the rights and obligations of individuals in particular communities, as they are actually protected and enforced by judicial authority; and combining the two, I would apply the general term of jurisprudence to the science, which regards the rights and obligations of individuals in a state of society, as capable of being protected and enforced by judicial authority, accompanied with a knowledge of the manner in which they are actually protected and enforced in particular communities.

This definition includes the objects to which the science may be applied, and the knowledge of its actual application, the general principles inherent in the nature of the subject, and the modification of them under particular circumstances, the grounds of obligation which are incident to all communities without distinction, and the particular forms and institutions, by which in different countries those grounds of obligation are diversified and maintained.

The state of information which is to satisfy the full extent of this definition, requires a full and accurate knowledge, as well of the general principles of natural justice as of all the particular systems of human law, whether conformable to or deviating from those original principles, whereas any subordinate knowledge is a partial application of the science of jurisprudence.

In endeavouring upon a former occasion to illustrate the judicial character of an eminent magistrate, I considered it as a deduction from his general conduct, during a long and active discharge of the important duties of his situation, that he regarded jurisprudence as a rational science, founded upon the universal principles of moral rectitude, but modified by habit and authority;

authority; and although there may not apparently be much of novelty or peculiarity in the sentiment, expressed by this description, I believe it will be found upon a careful examination, that it is a sentiment, the practical attention to which has been very far from corresponding to the speculative assent which it must necessarily command, and to its intimate connection with the welfare of society. The instances, of acting upon a similar impression are of frequent occurrence, but they are too much detached and insulated; the deficiency is in the cultivation of those inquiries, which will assist the mind in contemplating the science of jurisprudence as a regular and connected system, in which a familiarity with the whole is essentially conducive to an accurate discrimination of the respective parts, in which the relative influence of principle and authority is adjusted, with as much precision as is consistent with the quality of the subject; in which principle is not necessarily required to have the support and assistance of authority on the one hand, or allowed to assume an undue and inconvenient controul over it on the other, and by which the operation of authority itself is regulated, according to those fixed and certain principles which are most conducive to its utility and support. Too much reliance is placed upon the facility, with which the mind can accomplish those important purposes, according to the instantaneous exigence of the particular occasion; too little application is given to the means by which that facility may be most effectually acquired.

The contrast and opposition between right and wrong is, it is true, in many cases sufficiently strong to prevent the possibility of error, but the boundaries between conflicting claims are in other cases very far from being accurately defined; a correct estimate of the relative force of opposite arguments, can only be formed by an adequate investigation of all the different principles of decision, connected with or related to the object of inquiry; a diversity in circumstances apparently slight and insignificant, may in reality be sufficiently great to affect the very ground and propriety of the decision.

A subject which from its essential character, cannot always be susceptible of absolute precision, must often require the assistance of analogy; but analogy is a source of argument which demands a very comprehensive acquaintance with the various and sometimes opposite subjects from which it may be deduced. If a resemblance between what is sought and what is known is acknowledged to be perfect and complete, the term analogy ceases to be applicable, for the subject has already acquired the character of certainty;

tainty ; if a resemblance, although limited, is unopposed, it may without difficulty be acted upon and assented to ; but a partial resemblance or affinity to one subject may be opposed, by a different resemblance or affinity to another ; and the preponderance of similitude, or the grounds for preferring a smaller similitude in what is more important to a greater similitude in what is less so, may in many cases require a very acute and attentive discrimination ; but it must always be remembered, that analogy, however judiciously conducted, is but a secondary and inferior ground of judgment ; that it reaches only to conjecture and probability, and consequently in its greatest eminence can never attain the height of certainty and demonstration (a).

There is no part of jurisprudence in which an accurate discrimination is more essential, than in determining the proper limits within which those principles which in themselves are so important shall be applied : for a decision, which is perfectly correct as resting upon abstract reasoning, may be manifestly erroneous as opposing the mandatory dictates of authority ; and on the other hand, a mere decision of arbitrary authority may acquire an influence, to which it is not legitimately intitled by assuming the rank and character of a principle. And although certain general principles have an universality of application which is wholly independent of circumstances, there are others which, however correct, are of such inferior value as merely to induce a preponderance of argument, and with reference to which the certainty of a rule of conduct is of infinitely greater importance, than the exact and minute propriety of the rule which happens to be adopted. Few principles, of jurisprudence are of higher value, than that which inculcates a just and proper acquiescence in authority,

Whatever can assist in the acquisition of an adequate knowledge of the general principles of judicial reasoning, of their various relations, or oppositions, of the propriety of their application under existing circumstances, of their limits and restrictions, must cer-

(a) By the common law, a person convicted of grand larceny, having suffered the punishment of his offence, is a competent witness, but persons convicted of petty larceny remained wholly incompetent. The statute 31 Geo. 3. c. 35. recites this, and enacts that no person shall be an incompetent witness by reason of a conviction for petty larceny. The question arose in an inferior court, whether a person convicted of petty larceny, whose punishment had not been expired, could be examined. The court decided that he could not, for the legislature could not intend to place convictions of petty larceny in a different situation from those for grand larceny : the legislature had declared that the witness should not be incompetent ; the court decided that he was so : this was a false application of analogy, for it was analogy opposed to demonstration.

tainly be admitted to form a valuable object of scientific inquiry.

Positive and local law is in itself an object merely of peculiar obligation and concern; the acquisition of a knowledge of it is, therefore, in its immediate application, a matter of confined and limited interest, while the very term of general jurisprudence imports an object which has no local boundary; but if juridical practice, according to the beautiful exposition of *Blackstone*, is greatly assisted by the social quality of other sciences, by history, by logic, by mathematics, by experimental philosophy; if even the illustrations of poetry can properly be connected with the administration of justice, surely it must be acknowledged that an extensive and familiar acquaintance with the judicial system of other countries, is in a peculiar degree calculated to produce a similar effect; the analogy of subject is the most immediate and direct; an illustration of the questions arising in one society, may be deduced from the resemblance, or even from the contrast which is found in the institutions of another; and by an enlarged and general acquaintance with different systems, an accurate distinction will be formed between those great and fundamental principles, which, being deduced from natural reason, are equally diffused over all mankind, and are not subject to alteration by any change of time or place, with respect to which there is, "a striking uniformity among all nations, whatever seas or mountains may separate them, or how many ages soever may have elapsed between the periods of their existence, and those laws which, proceeding merely from positive institution, are consequently as various as the wills and fancies of those who enact them (*a*);" and while this course of inquiry is beneficial to the jurist, in promoting the objects of his profession, it will be no less interesting to the philosopher in investigating the permanent attributes and casual varieties of the human character. If the history of laws is less engaging than the details of battles, and the chronicles of events, the disadvantage will arise, not from the nature of the subject, but from the manner of presenting it.

In matters of evidently positive institution, a striking resemblance and conformity are sometimes discovered between the systems of different countries, which may be the effect either of casual coincidence, of imitation, or of some common cause; but whatever may be the origin of the conformity, if the general principles of the subjects are analogous, the particular exposition of any inci-

(*a*) Sir Wm. Jones's prefatory discourse to the speeches of *Isæus*.

dental question in the one country may be facilitated by the previous discussion of it in the other. Sometimes a system, which upon the whole has a manifest superiority, may be susceptible of improvement from adopting the accidental particulars of another confessedly inferior, provided they have an adequate capacity to blend and assimilate with the foreign stock, into which they are ingrafted.

The danger to be principally avoided, in rendering one system of jurisprudence subservient to the improvement of another, is mere servility of imitation; whereas the purposes of utility can only be attained by a careful and judicious discrimination. Wherever a question arises, with respect to the incorporating an adventitious rule of decision, it is essentially necessary to weigh with mature deliberation its nature, its tendency and effects, and in particular its adaptation to the system already established. The general excellence of any system of jurisprudence, is by no means sufficient to warrant the imitation of any of its particular decisions, without cautiously ascertaining the excellence of the decision as resting upon its own inherent merit; the source, and nature, and relations of the decision, are to be duly taken into consideration; it must be examined whether it was the result of any local or temporary cause, the consequence of any peculiarity in the general system of which it constitutes a part; or whether it was founded upon principles of universal application. The particular circumstances which rendered it necessary in *Rome*, to enact the *Lex Papia Poppæa*, for the discouragement of celibacy, can have no legitimate operation in directing the judgment of an *English* tribunal, with regard to the validity of a condition in restraint of marriage (a). However excellent a disposition may be, considered with reference to the principles of abstract reasoning, it cannot be followed with propriety, if the consequences of it would be inconsistent with the authority or principles already subsisting in the society where it is proposed. Whatever may be the wisdom of a regulation, or the advantage of imitating it, it cannot be supplied by judicial construction, if in its nature and character it is merely matter of positive institution; for it is only in applying the principles of correct analogous reasoning, under circumstances of a similar character, that the benefit of conformity can be properly obtained; but there is no analogy of character between legislative provision in one community, and judicial interpretation in another. It is desirable to define and reduce to certain regulations, subjects of general occurrence, so far as is consistent with a proper

(a) See *Stackpole v. Beaumont*, 3 Ves. 96.

liberty of conduct, and the regulations adopted from their intrinsic excellence may be very proper objects of imitation; but it is impossible with any correctness to consider this regulation in the same point of view, as the decisions which are illustrative of a common principle, whether in the same community or another. Before the statute of frauds, it would have been palpably absurd to have rejected parol evidence of a contract of sale, to the value of 10*l.* because the ordonnance of *Moulins*, excluding such evidence in cases exceeding the value of 100 livres, had been found beneficial in *France*. It would be equally erroneous to decide a question respecting the freight of goods, upon a mere principle of conformity to the ordonnance of *Louis XIV.*, accompanied by a favourable opinion of the utility of the enactment; for, although this ordonnance is in many respects an exposition and application of the law of natural reasoning, it in others is avowedly a mere exertion of positive authority. I have some doubt whether this principle has always been sufficiently attended to in practice. In the well known case of *Luke and Lyde*, 2 *Bur.* 882. 1 *Bl. Rep.* the ordonnance of *Louis* is referred to generally, as one amongst other authorities of foreign law in support of the decision.

In the essay which I some time ago submitted to the public on Bills of Exchange, I had more than once occasion to advert to instances, in which the positive institutions of particular countries appeared to have been erroneously regarded as general principles of mercantile law.

In surveying the laws as well as the manners of other countries, certain peculiarities are continually discernible; which excite a triumphant exclamation at their strangeness and absurdity. It however very frequently will be discovered upon a fair investigation, that their introduction was occasioned by some adequate motive of convenience and advantage, that their continuance has rendered them so habitually familiar, and that so many more essential circumstances have acquired an intimate and fixed connection with them, that an alteration in them might be attended with greater prejudice than utility. Whatever we have been long accustomed to we necessarily look at without emotion; and although it would be ridiculous to imitate the apparently unaccountable singularities of others, the mere existence of such singularities cannot reasonably be considered as a motive for discrediting the general excellence with which they may be connected, by those who reflect upon the impression which would be naturally excited by circumstances, which from their constant occurrence are unnoticed by themselves. The letter of the ambassador of *Bantam*, is a happy exemplification of this idea with respect to the ordinary
course

course of our general manners. It would not be necessary to call in the aid of foreigners, in order to excite a smile at many of the seeming, together perhaps with some real, absurdities which have ingrafted themselves into our laws. Our various introductions of *John Doe* and *Richard Roe*, our solemn process upon the disseisin by *Hugh Hunt*, our casually losing and finding a ship (which never was in *Europe*) in the parish of *St. Mary le Bow* in the *Ward of Cheap*, our trying the validity of a will by an imaginary wager of five pounds, our compassing and imagining the king's death, by giving information which may defeat the attack upon an enemy's settlement in the Antipodes, our charge of privately picking a pocket, or forging a bill *with force and arms*, of neglecting to repair a bridge, *against the peace of our lord the king, his crown and dignity*; are circumstances which, looked at by themselves, would convey an impression of no very favourable nature, with respect to the wisdom of our jurisprudence; but we know, and we also know that it is the judgment of those who have no motives of partiality, that the general character of that jurisprudence cannot be the theme of too exalted a panegyric, and the reflection may prevent our hastily drawing unfavourable conclusions, with respect to the juridical wisdom of other countries, in consequence of our inability to account, upon any principles of rationality, for some of their particular institutions.

To form a perfect and adequate system of general jurisprudence, it would be requisite, after taking a comprehensive view of the different modes of government and legislation, of their prevalence in different ages and countries, of the causes of their stability or decline, of their advantages and defects, with respect as well to their natural tendency, as to their particular relations and connections, to proceed to the examination of the respective objects of juridical science; to the qualities, which are applicable to all persons in general, and to the special circumstances of discrimination, whether proceeding from natural causes or particular and accidental relations, to the different subjects of property, and the modes of their acquisition, direliction, or transfer, to the causes of personal obligation, whether arising from compact, from accident, from injury, or from neglect; to the public duties resulting from the relation of each individual to the community, of which he forms a member; to the acts of aggression by which the general interest and security of that community may be violated, and the means by which they may be repelled: with respect to all these subjects, tracing the nature of the consequences which would result from the nature of the subjects themselves, in respect to the duties of morality, operating upon the personal conscience of the individual, examining

examining how far the obligation thence deduced is peculiar to that particular sphere, and necessarily dependant upon the voluntary exertion of the will, and how far it may on the other hand admit of coercion, or require modification from external authority, by reducing to certain limits, and giving a particular direction to the performance of duties, which in their character are indefinite and imperfect, and ascertaining the subjects upon which natural reason is no otherwise concerned, than in requiring that it should receive a certain and definite quality from positive law. Having completed the examination so far as relates to the nature and character of the respective subjects of enquiry, it must be continued in its several parts, by an historical investigation of the manner in which the different principles have been applied; in which they have been conformed to, or varied from, in the different systems which have actually prevailed; to which must be added a relation of the various modes of administering justice, and carrying into execution and effect the provisions of the law, and more especially of the manner of ascertaining, in cases of dispute, the existence of the facts to which those provisions are to be applied. To stamp a proper value upon the production, it must neither be too much confined to slight and superficial allusion, nor enter too extensively into minute particulars of laboured and professional detail.

It is unnecessary to mention how distant we are from the period in which a fabric of such extent and importance can be completely erected, and how small a progress has as yet been made towards it; but from the co-operation of various hands, the object may possibly be at length accomplished. Some may employ their assiduity in the procuring of materials, others their skill in adapting them to the design; the work may progressively advance in its respective parts, upon a principle of unity and combination, which may tend to the completion of it as a whole. Some valuable contributions have been already made to this important purpose. The historical law tracts of *Lord Kaims*, are conducted upon a very judicious system of investigating the natural principles of some of the most important objects of juridical science, and tracing the application of them in the laws of *Rome*, of *Scotland*, and of *England*; but a comparison between the laws of *Scotland* and *England*, conducted, I think, with great fairness, is apparently the leading object of the undertaking; to an inhabitant of the southern part of the island the work will be less attractive, than it might easily have been rendered, in consequence of the terms and institutions of the Scotch law being treated as already familiarly known, and the general phraseology is in many cases of a character to which the

English

English reader is unaccustomed. The view of the distinction of ranks in society, by Professor *Miller*, is a highly interesting and important publication. It perhaps may be considered as referable more particularly to the state of manners in the different stages of civilization; but the connection between manners and laws, which pervades the enquiry, attaches considerable value to the work, as conducive to the improvement of the science of jurisprudence. It is much to be regretted that the public have not more extensively the benefit of any permanent traces of the instructions of this eminent person, which occasioned such general resort to the seminary of which he was a member; according to the unanimous testimony of his merits, he had a very peculiar felicity in presenting the objects of his science, in a form which was equally adapted to the purposes of amusement and information. A great accession would be made to literature and science by an accurate view of the lectures which were so attractive in their delivery; and although the vivacity, the happy illustration, the engaging manner of the Professor would be lost, the materials which remained could not be otherwise than highly conducive to the assistance of those who were desirous of prosecuting a similar course of investigation.

The introduction of *Dr. Croke* to the case of *Horner v. Liddiard*, has been very far from attracting an attention commensurate to its interest and importance. The case which it precedes, like every other judgment of *Sir William Scott*, affords an accurate, an instructive, and an elegant view, of the subject to which it immediately relates (a); but certainly there is some perversion of relative importance, in rendering that case the principle, and the essay which precedes it, the accessory. With respect to space (which I admit affords no very important argument,) the case occupies about a fifth part of the extent of the introduction; but in addition to this minor consideration, the analytical view of the principles which regulate so important a subject, as the intercourse between the sexes, the valuable effects resulting from the permanent connection of marriage, and from the discouragement of promiscuous intercourse, adultery, and concubinage; together with the historical survey of the application of these principles, and of the consequent distinctions between the legitimacy and illegitimacy of the offspring, traced through the several periods and divisions of society, conducted with an ability in every respect adequate to the undertaking, will convince every one who has the satisfaction of reading the performance, that the learned writer has done great

(a) The nature of the connection between illegitimate children and their parents.

injustice to his own share of the publication, by assigning it a subordinate character.

The essay on the Law of Bailments, is a work of which commendation would be manifestly superfluous. So exquisite a specimen of the application of literature to jurisprudence, however long it might have been fated to experience an unmerited neglect, could not but at length receive the meed of approbation. But whatever assent has been given to its very distinguished merit, it cannot be denied that it has as yet produced a very limited effect in exciting a disposition to concur in the accomplishment of the grand and important design, of which it may be regarded as a part and model. Its very excellence has perhaps contributed to the diminishing its incidental advantage, for any attempt to emulate can only excite a mortifying comparison, until the task shall fall into the hands of another *Sir William Jones*; but while others will justly despair of approaching the same standard of perfection; while they look with distant admiration at the excellence, which they are conscious of their inability to attain, their industry and zeal for the promotion of so desirable an object will not entirely be misdirected; and while contemplating the specimen before them as a model, they disclaim the idea of competition, they may still enjoy the satisfaction of contributing in an inferior degree to the attainment of the valuable purposes which that model was originally intended to promote.

The translation of the speeches of *Isæus*, by the same admired writer, with his prefatory discourse and commentary, are also to be regarded as very valuable materials for the same important purpose.

It is manifest, that in every endeavour to contribute to the advancement of general jurisprudence, the *Roman* law must occupy no inconsiderable portion of attention, both on account of its intrinsic excellence, and the extensive influence which it has had upon almost every judicial system in modern *Europe*. In directing our attention to this subject, we shall perhaps find little to admire, and still less to imitate, with respect to the constitution of the authorities from which it immediately derived its obligatory character. If, in one place, we are disposed to revolt at the excessive magnitude of imperial power, in another, we shall not find much greater room for approbation in the prevalence of popular sedition. In the various distributions of authority, whether legislative or judicial, we shall not be disposed to resort to *Rome* for models of perfection; but in the opinions, which the *Roman* jurists deduced from the pure source of genuine philosophy, we shall meet with innumerable instances of the admirable
union

union of wisdom with justice, in which the force of truth is so strongly manifest, that to be assented to, it is only requisite to be seen. We shall see a force and energy of expression, a felicity of illustration, and a conciseness and elegance of diction, indicating the operation of minds, possessing a comprehensive command of the whole of a subject, which is perceptible in its influence on every individual part. We shall meet in their original sources with many principles and maxims, to which we are habitually familiar, and which, from neglecting a more extensive range of investigation, we have been accustomed to consider as entirely our own. We shall meet with instructive, and frequently with perfect guides in the exposition of the various questions, which are of continual occurrence in an extensive range of social intercourse; and which, in the absence of positive authority, must be decided upon general grounds of rational jurisprudence, wherein those doctrines, which are most universally assented to, when clearly and perspicuously proposed, are not always in themselves the most immediately obvious. Even where it is impossible to expect a similarity in the subjects of inquiry, we shall receive valuable lessons, with respect to the most judicious course of investigation. A very cursory examination will satisfy us, that of the important remains of this celebrated system, the mandates of authority bear a very small proportion to the deductions of reason. It is true, that these remains are transmitted to us in a very imperfect and mutilated state; that the hasty and unskilful compilation of *Tribonianus* has obscured much of the excellence of *Ulpian* and *Papinian*; that the work professing to be a digest of all that was valuable in preceding authorities, is so totally destitute of arrangement, that many important passages are classed with titles, with which they have not any kind of connection; and that in general, the opinions having the force and efficacy of laws, which are collated under each particular title, are placed in a succession merely accidental, and destitute of all regard to order and propriety. It was a foolish vanity in *Justinian*, to ordain that all future appeals to the existing law should be referable to his own authority; that the correct investigation of the opinions of the jurists who preceded him, should be absolutely precluded; and that the compilation made under his auspices, should be the only standard to be afterwards referred to. It is a question of controversy, how far the exercise of his power was extended, whether it consisted merely in prohibiting appeals to the volumes that had been previously resorted to, or whether it included their absolute annihilation. But, after every deduction on account of the pride of *Justinian*, and the inadequacy of *Tribonianus*, it should be re-

garded as matter of satisfaction, that the collection was actually ordained. It might in other hands have been composed with greater care or judgment; but that it was composed at all, was a circumstance that must, in the eyes of impartiality, be always considered as favourable to judicial science. The law had at that period attained a very cumbersome and inconvenient immensity, and was dispersed through a great number of different volumes; the period of its authority was (unknown to the *Emperor*) at the eve of its extinction. If not wholly annihilated in the ages succeeding, it was confined within limits, which, in proportion to its former dominion and its subsequent influence, were perfectly insignificant; and in the long series of ages involved in darkness and ignorance, there is the highest probability, that the greater part of the materials that had been thus united into one compact system, would have perished. Whether at any period the digest had been wholly lost, and its restoration was wholly the effect of an accidental discovery of a single copy at *Amalfi*, or whether some other copies of it had been still retained, is chiefly a question of antiquarian curiosity; for it is certain that, during the lapse of several centuries, the knowledge of it was very limited and confined; that the copies known to be in existence were extremely few, and that its continuance to the æra of resuming its more than pristine consequence, during a period when so many other treasures of learning fell into irremediable decay, was the result of accident.

The reference which continually occurs to the two systems, or, as they are usually called, schools of jurisprudence, the maxims of which are supposed to be frequently confused in the compilation of *Tribonianus*, renders it desirable to state an outline of their principal distinction, which cannot be done more satisfactorily than by inserting the following extract from *Gravina*:

“ Jurisprudence was divided into two families, the *Cassiani*, and the *Proculiani*. The separation originated with *Atteius Capito*, the pupil of *Ofilius*, and *Antistus Labeo*, the pupil of *Trebatius*, both of which instructors had been under the tuition of *Tubero*. *Capito* adhered more closely to what had been transmitted by those who had preceded him, and was principally attached to written authority. *Labeo*, with a certain ardour of mind, gave more scope to his disposition, and, trusting to the effects of his wisdom, took a greater range, and inclined in favour of novelty. He therefore introduced many things which were unknown to, or unattempted by, the ancients. Their respective scholars adopted the spirit of their preceptors. *Capito* was succeeded by *Sabinus*, from whom originated the appellation of the *Sabinians*. *Cassius*, who

who succeeded *Sabinus*, was the origin of the term *Cassiani*. *Labeo* was succeeded by *Proculus*, *Nerva* the elder, and *Pegasus*, whence arose the *Proculiani* and *Pegasiani*. The first received from *Capito* the reverence for antiquity, the others from *Labeo* the freedom of invention. This difference, which arose in the reign of *Tiberius*, continued until the time of *Antonius*."

"The contention of these sects at length wore out towards the decline of jurisprudence, and as the ardour of the opposite dispositions began to cool. Many traces of this dissention remain in the books of the law, and we have still many remains of the conflict between the opposite schools; which *Tribonianus* was not sufficiently able to guard against, although *Justinian* held out a wonderful promise of congruity. This promise has infinitely perplexed the ingenuity of those who, relying on his veracity, have chosen to ascribe the difficulties arising from a repugnancy of opinions rather to their own ignorance, than to the negligence of the compilation, of which *Cujas* affords several instances. It is, therefore, of considerable importance to know which sect any jurist belonged to: and, as their principal difference consists in the *Sabinians* inclining to equity, and the *Proculians* adhering to strict law; their opposite opinions being introduced into one entire system have occasioned the occurrence of different and even opposite decisions in some parts of the law."

The inconveniences arising from the injudicious manner in which the compilation of the digest was committed, may be in a great measure obviated by the more accurate arrangement in which the law is presented by *Domat*; and I conceive more particularly by the important labours of *Pothier*, in his edition of the digest, of which I have never had an opportunity to obtain an inspection; but of which, a very particular and satisfactory account is given in the Eloge, whereof a translation is prefixed to the present volume.

The most eligible course of conducting the study of the *Roman* law, appears to be the use of the *Institutes*; which are a well arranged and accurate compendium, with the accompaniment of some able commentary, and a reference to the different passages in the other parts of the law, which the commentary points out for the purpose. I am not so familiarly conversant with the numerous expositions of this law, as to be enabled to pronounce which of them is absolutely intitled to preference on the ground of comparative excellence; but there can be no difficulty in confirming the reputation which is justly attached to *Vinnius*, as one of the most valuable and instructive. It may here not be irrelevant to notice the omission in the *institutes*, and consequently in the

various writers by whom that work is used as the basis of their instructions, of one of the most important objects of juridical inquiry, the doctrine of evidence, respecting which the more extensive collections of the digest and code furnish very valuable information. This subject, like most of the other branches of judicial science, has not been deficient in its particular commentaries, of whom the most celebrated are *Menochius* and *Mascardus*. Of the former, I am not in a condition to make any particular observation. The latter, in the compass of four large folios, presents a full and well digested view of the nature of evidence in general, and of the different proofs which are applicable to the various controversies that may occur in the administration of justice. *Everhardus* has also given a very extensive and perspicuous view of the different applications of the general principles of evidence; and although the entire perusal of these works may be, perhaps, considered as an appropriation of too large a portion of time to an auxiliary science, the occasional reference to them will be found materially to facilitate the exposition of many important questions of daily occurrence amongst ourselves.

For attaining an historical view of the *Roman* jurisprudence in its origin, its progress, its principal institutions, and the cultivation of it as a science subsequent to its modern revival, the work of *Gravina* may be confidently recommended as presenting every important information in a satisfactory and engaging manner; and this study will be found not less valuable for its assistance in the illustrations of classical learning, than for its connection with the science of jurisprudence. A more summary, but very able and elegant exposition of the same subject is contained in the history of *Gibbon*. The writings of *Heineccius* seem adapted to a more extended and particular course of study. *Taylor's* Elements of Civil Law are, perhaps, more than any other work calculated to assist in the exposition of the mutual relation of the legal science, and the general literature of ancient *Rome*. *Dr. Brown's* Lectures adopting the arrangement of *Blackstone's* Commentaries, will in a peculiar degree facilitate a comparison between the laws of *Rome* and *England*. *Hopperus de Arte Juris*, may be very judiciously resorted to as a ground-work of general jurisprudence, with a fabric, the materials of which are almost entirely *Roman*. It is, however, in many cases subject to the observation, that the general principles are rather adapted to the particular system, where the system should only have been resorted to as illustrative of the principles. The existence of particular institutions seems, in many instances, is to be regarded as a sufficient evidence of their inherent necessity or propriety. My own partiality

tiality for this subject, regarded as an auxiliary science, might enable me to increase the catalogue (a); but an acquaintance much more extensive and familiar than any which I have had the opportunity of acquiring, would be very insufficient to appreciate and particularize the advantage which might be derived from resorting with proper discretion and moderation to the numerous other jurists, whose writings evince the degree of regard which has been paid to the mandate of *Justinian*, *ut nemo neque eorum qui in presenti juris peritiam habent, neque qui postea fuerint audeat commentarios iisdem legibus adnectere.*

In adverting to the laws which have been the subject of the preceding observations, it will be requisite (as indeed it is requisite in every other inquiry) to have an adequate view of the object, intention, and bearing of any particular proposition, and of the subject with which it is connected, before an adequate judgment can be formed, by a mere perusal of the words, of its justness, and propriety. This consideration occurred to me very forcibly, upon perusing a triumphant comparison of the description of liberty given by *Sir William Blackstone*, with that of *Florentinus*, or as it is expressed with the absurd definition in *Justinian's* institutes, as being *naturalis facultas ejus, quod cuique facere libet, nisi si quid vi aut jure prohibetur*—a kind of liberty which it is said must exist even under the greatest despotism—a slight attention would however have shewn, that the subjects intended to be described in the two places, and the respective applications of the term by which they are denoted, are essentially different; that the one concerns the character of the relation existing between the members of a community, and the governing authority as being marked by freedom or despotism; that the other was confined to the peculiar state of certain individuals, as contrasted with others in the same society, to the distinction between freemen and slaves, and their respective attributes according to the provisions of the law, to the legal right of exercising their own will, and the legal obligation of obedience to the will of another: and that although no country is so despotic, but that a man may do whatever is not prevented by law or force, the distribution of the inhabitants of some countries may render it necessary to shew, that a person who is by force constrained in his actions, may still be free in respect to his legal rights and character. I have dwelled more particularly upon this instance, because I conceive that even where the definition of the civil law has not been the object of reprehension, the application of it has not been unfrequently founded upon the same mistaken notion of its object.

(a) *Mr. Butler's Horæ Juridicæ*, of the existence of which I was not apprised at the time of committing this introduction to the press, cannot be mentioned in too favourable terms of recommendation.

It is well known that previous to the revival of the *Roman* law, as an object of general attention, the feudal system had acquired a very extensive influence over the greater part of *Europe*, and that the same causes operating upon different countries, had produced in their legal institutions a very considerable similitude, accompanied, as was natural, with several local peculiarities. This system being primarily referable to the tenure of land, and only affecting other subjects incidentally, would readily admit of a coalition with the *Roman* law, as affording a general exposition of the rights and obligations of persons resulting from the principles of natural reason, and having very little interference with the existing institutions to which it might be attached. As a rule of private life, therefore, it might readily and in perfect consistency with the institutions which already prevailed in different countries, be admitted as a useful guide of judicial determination. The admiration of its excellence, with respect to the exposition of general principles, would in many instances naturally lead to an imitation of its particular regulations in other respects, when there was no repugnancy to the municipal systems previously existing; and a general partiality having been admitted, the same spirit of imitation would in many cases lead to an alteration of the usages already established so far as it could be done consistently with the favourite maxims of each particular community. The change would in some instances operate gradually and imperceptibly; in others, it would result from the immediate interposition of positive authority; sometimes it would originate from a mere fondness for novelty, at other times be dictated by a genuine spirit of improvement. But under all the various modifications in which the new system of law was introduced, it would in many respects have an aspect essentially different from that by which it was distinguished in its original and native authority. It would no longer form an entire and independent subject, but would receive a character and impression from the adventitious systems, with which it was incorporated: the distribution of public authority, whether legislative, executive, or judicial, would continue to be governed by the pre-existing law of the respective communities, and this circumstance alone would form no inconsiderable difference in the respective systems of jurisprudence. In many other respects the jurisprudence of *Rome* was local and peculiar. Parental authority, in the modern countries of *Europe*, has very different limitations from those which appear in the collections of *Justinian*. The doctrine of adoption and emancipation is a subject which has not at present any existence. The vassalage of the feudal system, had but a slight analogy to the servitude of *Rome*. The duties of freedmen and the rights of patronage, the source of so many legal regulations,

regulations, had no longer any existence. Many of the principles of the *Roman* law respecting private transactions were rejected as trifling subtilties. On the other hand, many regulations of a positive nature were deemed proper objects of imitation; and the *Roman* law, in respect to contracts, testaments, and some other subjects of general interest, has been very extensively adopted in most of its leading particulars, and though the imitation has in every case been partial and limited, and there has been considerable diversity in the manner and degrees in which it has been pursued, the reference to a common origin, and the use of similar terms has produced a very considerable conformity between the different systems in which this principle has prevailed. Throughout the greater part of *Europe* the law of one country may, in its principal features, be generally regarded as the law of another; and the juridical writers of different countries may be regarded as illustrating a common science, almost as much as the writers upon any general subject of physical research. It is manifest that this conformity between different countries, wherever it can be attained without prejudice to more important advantages, must be attended with considerable convenience, and very much facilitate the cultivation of a general intercourse.

At a period subsequent to the revival of the *Roman* law as a subject of general study, the pursuits of commerce acquired a magnitude and importance unknown to former ages, and contracts were introduced with a view to its security and facility of which no traces had occurred in preceding ages. The necessary communication subsisting between the persons engaged in traffic induced a similarity of habit and character, and an institution of common usages between the inhabitants of different nations, from which a system was gradually formed, which acquired the name of the law and customs of merchants, and which, subject to the particular effect of some positive regulations, acquired by a kind of tacit consent an extensive influence and authority in the several countries, which were interested in maintaining and extending the general intercourse.

To proceed to a more particular application of the general principles already referred to, the law of *France* previous to the revolution (with which this publication is more particularly connected) is founded on a combination of the *Roman* law, the feudal system, the general *lex mercatoria*, and several positive institutions and local customs. The *Roman* law had a very different degree of influence in different parts of the country. In the provinces bordering upon *Italy*, which were called the *Pays de droit écrit*, it was considered as the municipal law; in the other parts of *France*,

called the *Pays de coutumes*, the common law was deemed to consist in certain usages subsisting among themselves, and the *Roman* law was only regarded as written authority with respect to the principles of natural justice ; but even in these the application of it was very general and extensive, and it appears to have been the rule most frequently applicable with respect to the ordinary occurrences of society. A great diversity of customs prevailed in the different provinces of *France*, the inconveniences of which were much felt and complained of, and many very able writers were engaged in their illustration. *Pothier*, among his other public services, presented a very valuable exposition of the custom of *Orleans*. In many cases where the custom of a particular province was silent, it was a general principle to decide in conformity to the custom of *Paris* ; the direct authority of which extended over a part of the kingdom nearly equal to that of all the others united. The term *coutume* was applied not only to the subsisting usage, but to the district in which it prevailed. The legislative power of *France*, during the later ages of the monarchy, was vested in the king, and was exercised by his issuing ordonnances and edicts, which only differed from each other by the former commonly embracing a variety of subjects, while the latter were usually confined to a single object. These acts of legislation were not deemed to have acquired the force of laws, until they had been registered in the parliaments, and sometimes registration having taken place in one parliament and not in the other, the law was obligatory in the first, and inoperative in the last. The registering an ordinance was not an act respecting which the parliaments had, properly speaking, any discretionary authority ; but their compliance with the order of the sovereign for this purpose was frequently delayed, and a remonstrance presented submitting it to reconsideration. These remonstrances were, I conceive, never received with very great favour, and it is well known that they were the frequent occasion of violent conflicts between the parliaments, more especially that of *Paris*, and the crown.

The administration of justice resided in the several parliaments and inferior jurisdictions of the provinces and other districts ; but from the cases which have occurred before the parliament of *Paris* it is evident that it entertained a jurisdiction, at least in some cases, upon subjects arising without the limits of the province. The jurisdiction of the parliaments was principally exercised in appeals from inferior tribunals, but there were some cases in which they exercised original authority. In case of dissatisfaction with the judgments of the parliament, an application might be made to the council, who had an authority to refer the case to the consideration of

of a different parliament, but not to reverse the judgment of their own authority. The number of tribunals established in *France* for different purposes, and the number of members of each tribunal was very great. The sale of judicial offices appears to have been partly prohibited by law, but it is notorious that the practice of it was very prevalent.

From the number of judicial appointments, and apparently from the facility of acquiring them, it appears to have been common to regard them as a direct object of professional pursuit, and to enter upon the administration of law without any previous practice of it as an advocate.

These situations were open to persons at a very early stage of life. In the Eloge included in the present volume, mention is made of *Patbier* taking a more active part in the court of which he was a member when under the age of 25 years, (the common period of majority in *France*) than had been usual in the same district. In the addresses which it was the duty of *D'Aguesseau*, in his capacity of Advocate and Procureur General, to make to the parliament of Paris, upon the opening their sessions, we see an affectation of frivolity frequently expatiated upon, as a prevalent foible inconsistent with a due regard to the duties and dignities of their situation.

The subjects, of which the law took cognizance, were more extensive than those with which we are familiar in *England*. Among other instances, what is called questions of state were very prevalent; these consisted in suits for establishing the relation of persons as members of a family, without any reference to rights of property dependant upon such relation, and were always treated as objects of very solemn and important attention. The conduct of parties in their domestic relations, such as the making an adequate provision for the adult members of their family, seems also to have fallen under the direction of legal authority.

According to the common administration of justice, the complainant presented a memorial containing the grounds of his demand, with the legal arguments by which it was supported, and making a formal conclusion in some degree analagous to the prayer of a bill in Chancery, stating the judgment which the court was desired to pronounce; and a similar memorial with the exception of the conclusion was presented on the part of the defendant; and the merits of the respective parties were also discussed by the oral pleadings of the advocates; after the discussion of the parties was compleat, the case was referred to one of the judges, or, as they were called, counsellors of the court, to report upon. It was the duty of this judge, who, with reference to the particular case, was called the reporter, to state (as I conceive, in writing) the nature of the demand, the facts admitted and disputed, the points of

law arising out of those facts, the evidence by which the disputed facts were supported, and the legal arguments adduced upon the respective points; to these, as well as I can collect, the opinion of the reporter was sometimes added and sometimes not, probably at his own discretion. The report was communicated to the other members of the court; and the judgment was formed upon a private deliberation; the sentence alone was disclosed, the opinions of the particular judges being given under an obligation of secrecy. In the parliament of *Paris*, and probably in the other parliaments, duties similar to those of the reporter devolved upon the advocate general; who upon such occasions acted as an assessor, and his review of the case was, in common with the advocates for the parties, denoted by the term *plaidoyers*, or pleadings^(a). They were manifestly addressed orally to the court, and after stating fully and distinctly the several points and arguments which had been relied upon by the opposite parties, he submitted his own impressions with respect to them, taking a very comprehensive view of the several legal considerations which might tend to influence the determinations, and ending with a formal conclusion, stating in technical language the judgment which, according to the circumstances, he deemed it would be right to pronounce.

In this course of proceeding, as in all others, the interests of justice might suffer from the personal carelessness and ignorance of the officers into whose hands they were committed; but the general tendency of the proceeding was manifestly to secure a deliberate and adequate attention in the judge to the arguments which those to whom the interests of the parties were confided might deem it material to adduce; and the sudden momentary impression, which experience shews not always to be the least strong where it is the most erroneous, would not prevent the possible advantage that might eventually result from a more deliberate consideration. To render justice perfect, every effort should be made to render it satisfactory so far as that object can be accomplished, consistently with its purity and accuracy; and nothing can more effectually promote the satisfactory administration of justice than to convince the parties who have an interest in it that those considerations which to them have appeared essential were not flurred over with indifference or inattention; that if they were not found entitled to assent, they at least were not hastily rejected as unworthy of examination.

The great purposes of justice can never be much assisted, by answering a serious proposition with a contemptuous ejaculation.

(a) See the two pleadings of *D'Aguesseau*, subjoined to the following volume.

Forensic discussions appear to have been generally conducted with a spirit of science ; and considerable attention was paid to that kind of eloquence, which is calculated to present the substance of the argument in its most attractive and convincing form, without an unreasonable addition of ornament purely adventitious. The *Causés Celebres et Interessantes*, form a very engaging selection of cases, which for the most part amuse the attention by their interest and vivacity, while they conduce to the extension of legal knowledge by their accuracy and good sense. I am induced to think that the administration of the law was, notwithstanding strong prohibitions against it, not unfrequently exposed to the influence of private solicitations. The occurrences stated in one of the pieces of *Marmontel* called, " Tales of an Evening," describe the solicitation of various parties to the advocate general with respect to his report ; and although publications of this description may not appear the proper sources of information respecting the course of judicial practice, it is obvious that, even in offering an imaginary representation, a circumstance would not be alluded to as matter of familiar occurrence, for which there was no foundation in reality. I have also in works more immediately referable to the subject, met with incidental remarks upon the impropriety of the practice ; although I cannot at present refer to particular passages.

There appears also to have been an undue interposition of regal authority, in directing the decisions which should be governed solely by unprejudiced opinion. Some passages in an extract from ordonnances relative to procedure, made by *D'Aguesseau*, contain a manifest reference to this circumstance as a matter of ordinary occurrence ; and his letters in his official capacity of chancellor shew frequent instances of directions to the judges with respect to the course of their conduct ; and other instances of reprehending the judgments which they had given ; and although the particular cases, so far as I have adverted to them, are composed solely of intimations founded upon the justice and propriety of the subject, it is obvious that such an interposition is open to perversion for improper purposes. The positive and absolute controul which the crown possessed over the members of the tribunals, as well as over the other subjects of the country, by arbitrary mandates of banishment and imprisonment, had necessarily a tendency very detrimental to that independance of judicial proceeding, which is one of the most effectual safeguards of right and liberty. In the administration of criminal judicature, we find many circumstances which have been very properly the subject of reprehension, and are with great justice contrasted with the superior excellence of the criminal

criminal law of *England*; the course of secret examination, the application of torture for the purposes of extorting confession, the horrid torments which converted justice into cruelty, the involving the members of a family in the guilt of a relative, not merely by the indirect effect of confiscation, but by a direct and immediate sentence, are some of the particulars with respect to which the inhabitants of this country enjoy an honourable and valuable distinction.

The writers of *France* have certainly contributed in an essential degree to the general promotion of juridical science; many of the positive institutions of the country upon mercantile subjects contain a wisdom and equity that have rendered them justly models for imitation, and in many cases, where they are not founded solely upon the direct application of authority, they may be regarded as a correct and judicious exposition of general principles. Upon the whole, although a mere fashion of imitating, without examination, the law of *France* would be a manifest absurdity; it must on the other hand be evident, that an attention to it conducted with discretion will frequently afford extremely valuable information and suggestions.

In attempting to offer any general observations respecting the jurisprudence of our own country, I very sensibly feel the arduous nature of my present undertaking; but I enter upon this subject with the confidence, that however inadequate I may be to do justice to the unparalleled excellencies of our constitution, no person could engage in such an inquiry with a firmer conviction of their value and extent; no person could come to the discussion of the subject with a more sincere spirit of attachment to them; and if I venture to suggest any remarks respecting the instances, in which some practical improvement may be adopted, I flatter myself it will be acknowledged that those suggestions are intimately connected with its acknowledged and existing principles, and are wholly referable to such accidental circumstances as are the natural effects of a long revolution of time, and a gradual alteration in the situation of the country. I hope it will appear that any slight acquaintance which I may have acquired with the juridical systems of other countries has confirmed the preference to our own; "they are only my visits, but this is my home." The surest practical test of the excellence of a government is the comparative comfort which for a succession of ages, and independently of the personal qualities of persons in authority, or other adventitious circumstances, is enjoyed by the great body of the people, subject to its controul and enjoying the benefit of its protection; and the application of this test will surely not be attended with any considerable

siderable difficulty. Although much of the actual happiness of each individual must result from circumstances peculiar to himself; it is impossible, where a general effect appears to be produced, to doubt the operation of a general cause. The gradation of society in this country, to the sovereign on the throne from the inmate of the meanest cottage, with no abrupt and sensible intervals, is greatly calculated to promote the common enjoyment and satisfaction, and to render the several classes of which the community is composed mutually subservient to the benefit of each other. While the affluent receive the assistance of the industrious, the industrious participate in the benefit of that affluence, which gives their exertions a proper direction and a suitable reward. The general state of society presents no obstacle to the well directed spirit of individual advancement; no man looks at him who is next above himself as placed in a situation of inaccessible superiority; and however powerful the operation of particular contingencies must necessarily be, however numerous the failure of individual exertion, the great sum of public felicity is manifestly much enlarged by the perception that there are no absolute impediments to discourage the spirit of exertion, or check the progress of improvement. While the greater and more distinguished instances of advancement must from their very nature be the portion of a few, the possibility of their attainment may animate the dispositions of all; and while the particular pursuit is often attended with disappointment in its ultimate object, the intermediate progress becomes a valuable acquisition, and even the least successful competitors have an almost infinite superiority of enjoyment, over any which could be possibly attained in the fancied state of general equality, or commonly expected in a society where the various ranks were distinguished by marked and distant intervals of separation. While that absolute inviolability is attached to the person of the sovereign, which shall protect the general harmony of the community from being disturbed by the machinations of factious ambition, the splendors of the sovereign are the splendors of the country, the powers of the sovereign are the active but regulated energies of the country, their exercise (subject to the common influence of human infirmity) may be often accompanied by error, but the situation of the personage in whom they are invested can seldom offer an inducement to prevent them by design; and while the sacredness of his character affords a security from personal responsibility, the highest exertions of his prerogative are incompetent to prevent the responsibility of those who violate the legal rights of his meanest subject. The stations of dignity which follow those immediately resulting from the relation of kindred

to the crown, present to all who are engaged in the offices of religion and justice a pledge and representation of the honour and importance attached to their respective avocations; the numbers engaged in actual competition for these elevated distinctions are small, but to manifest and evince the propriety of such flattering distinctions, is an interest which affects and pervades the whole. The hereditary portion of the legislature, receiving frequent accessions in individuals, distinguished by their valour or their learning, offers an honourable motive to useful exertion, and at the same time induces a peculiar degree of interest in supporting the permanence and stability of institutions of general benefit to the community, and opposes a strong barrier against the enterprises of rash experiment. The other source of legislative authority has a more immediate connection with the general mass of the community. The fiction that ascribes, contrary to all historical fact, the idea of a personal and actual representation of each individual member of the community to this important branch of the constitution, has been the source of much reflection upon the discrepancy between the actual practice and the theory, which, though merely a deduction from it, is treated as its essence and foundation.

It may readily be agreed, that if it were proposed to frame a new legislative assembly, with authorities similar to those of the House of Commons, a considerable variation from the present system of election might be deemed advisable; but the existing constitution of the House of Commons was not formed upon any principles of theoretical investigation, but resulted in a great degree from several accidental circumstances; and I think it is at least very much to be doubted whether it would be attended with any real advantage to alter a fabric which has so long been riveted and cemented together. A mere change would be naturally attended with detriment, and it would be very far from judicious to make the matter a subject of hazardous experiment; even those who entertain the opinion that an actual improvement might be attained, may find it not unimportant to consider whether the whole advantages of the measures which they would wish to adopt would clearly and unequivocally counterbalance the probable mischiefs that might accompany it. The scheme of universal suffrage, which by many is regarded not only as a perfect theory, but as a natural right that cannot be withheld without oppression, has never appeared to me to be that which would be most beneficial in the framing an entirely original constitution; for although it is perfectly clear that the rights and interests of every member of society are equally sacred, it by no means follows, that all the members of society are equally enlightened in respect to the means of securing and promoting

promoting the general advantage of the whole, that all are actuated by an equal interest and regard for its maintenance and preservation; the actual experience of popular elections does not evince that there is the greatest concern for the public interest, where there is the nearest approach to universal suffrage, or that the qualities of a useful legislator are identified with those of a popular candidate. There is a sufficient universality of representation for every purpose of practical utility, when there is a sufficient community of interest between the members of the legislature and the general body of society; when the makers of the law have the same objects to promote, and the same obligations to fulfil, as the individuals most remote from any concurrence in their appointment; when they are discouraged from assuming any improper or dangerous prerogatives to themselves, by the reflection that after a limited period they are to return to the ordinary mass of society; when a public discussion prevents the surreptitious introduction of measures hostile to the general principles of the constitution, or the general welfare of the public; when the persons constituting the legislative assembly are collected from almost all the various classes of men which have sufficient elevation in society to render them proper depositaries of a share in the charge of supporting the common benefit. The permanence of one branch of the legislature and the fluctuation of the other are together a great security against mutual encroachments, on regularity and order on the one side, or on freedom on the other, in acts which must require their mutual concurrence. I am far from supposing the existence of an Utopian state of absolute perfection, in which no personal considerations interfere with the dictates of public duty; but with respect to practical consequences, there does not appear to be any adequate reason for thinking that a different plan of parliamentary election would afford a greater security against the influence of the common defects and imperfections of human nature.

It may here not be irrelevant incidentally to observe, that objects of general legislation have not of late received any very considerable attention, and that discussions unconnected with any temporary political agitation for the most part excite very little interest. The large additions which are annually made to the statute book are almost entirely referable to the immediate exigencies of government, or to matters of very limited concern. I am by no means disposed to recommend an officious disposition to introduce changes in the law, without adequate motives of apparent utility; but the various alterations which result in the application and effect of laws from the mere lapse of time require a correspondent alteration in the laws themselves; the various inconveniences
which

which are actually experienced in the course of practice point out the necessity and propriety of meeting existing evils with adequate remedies.

The variety of detached and independent provisions, made with reference to similar objects, are frequently calculated to embarrass and mislead, and manifest the great advantage that would result from a systematic and connected view of the law, upon each particular subject of material importance, and the reducing it into proper order, by supplying deficiencies, and removing defects. The practice of making successive alterations upon the principle of reference to prior provisions, frequently introduces a set of amended amendments and explained explanations, of which even the enumeration is perfectly ludicrous, and of which the actual consequences are often extremely inconvenient ; when, probably, the entire new modelling of the whole would be attended with smaller trouble, than properly adapting the addition to the pre-existing system. Sometimes a legal provision is introduced to effectuate a desirable object, but with respect to which the particular interest of its supporters on the one side is only opposed by a general and contingent interest, which may happen to attach to any individuals of the community on the other ; and it would be a very useful though certainly not a very splendid application of vigilance and talent, to prevent such provisions being extended in opposition to the justice, which may be fairly due to those who may happen to be eventually affected by them. The composition and expression of acts of parliament is a matter which appears to be by no means regarded with an attention equal to its importance. To take an adequate and comprehensive view of the subject, for which it is intended to provide ; to contemplate the several effects which it may produce with relation to the various occurrences that may fall within its operation ; to pay a peculiar regard to the perspicuity of the language ; to avoid the opposite extremes of a vague generality and a verbose minuteness of detail, are objects of no light or superficial attainment ; but require extensive knowledge and understanding, and very deliberate and attentive consideration. How far this attention is applied, I fear it would reflect no peculiar credit on *British* legislation to inquire. A circumstance which is sometimes complained of, and I conceive with justice, is the overloading an act of parliament, prepared upon due consideration by persons who have applied a regular and connected attention to the subject, with additional clauses suggested by others to whom it is newly presented ; the accordance of these provisions, with the regular production to which they are superadded, can only be secured by a very cautious and judicious examination ; and although I am far from of-

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fering an objection to any proper attempts to ameliorate the proposals which may be offered for the improvement of the law, I think it highly requisite that every interference for the purpose should be accompanied with adequate circumspection. It is a common observation, that members of the legal profession are not in general distinguished for parliamentary talent. Whether the habits acquired by forensic discussion are peculiarly inconsistent with political altercation, I am not prepared or at present concerned to examine, but can have no difficulty in affirming, that the professional gentlemen who have the honour of seats in the legislature, would confer a very extensive obligation on the country, by applying a suitable assiduity to the objects that have been just referred to. It is observable that in the exposition of acts of parliament, *the wisdom of the legislature*, or the *idea of the legislature*, or the *intention of the legislature*, is sometimes referred to in a manner which appears to indicate a supposition, that every syllable in every act of parliament is weighed with the most scrupulous attention by a considerable portion of those invested with legislative authority; that all the consequences and relations of every provision are scrutinized with the greatest accuracy; that there is no redundancy of expression, or mistake of legal inference. Possibly there may be upon the whole considerable utility in the admission of this principle, without inquiring too strictly how far all those attributes which are applied of course to whatever is stamped with legislative authority would be ascribed to the materials, if the stamp were out of the question; but it is clear that this consideration affords an additional motive for those, who are solicitous of promoting the excellence of our judicial system, to exert their talents in rendering the fact as nearly as possible conformable to the supposition.

That portion of the law of *England* which is not founded upon written authority admits as extensively as any system of jurisprudence that has ever existed, the influence of general principles of justice and propriety. Those parts of the common law which are of a positive nature are of course partly founded upon causes of a local and peculiar nature, and partly derived from the various countries from which the present inhabitants derive their origin, the respective laws, like the respective languages, forming consistent parts of a general combination. Many similarities are known to exist between the laws of *England* and those of *Germany*, from which we in a great measure derived the model of our most valued institution, the trial by jury. I am enabled to speak with a greater degree of personal knowledge, of a very great affinity subsisting in many respects between the laws of *England* and *France*. The immediate effects of the Norman Conquest upon the juridical state

of *England* are sufficiently notorious ; and in the existing laws of the respective countries, as they stood previous to the æra of the late awful revolution, many traces still remained of the common origin, which could be resorted to with mutual benefit in the investigation of subjects which had not acquired an adventitious character from peculiar circumstances. The custom of *Brittany*, as expounded by *D'Argentré*, is well known to reflect considerable light upon our system of real property (a). Much as the introduction of the *Roman* law amongst us was opposed by our ancestors, and much as we are indebted to them for the motives and effects of their resistance, our earliest writers derived their maxims of rational jurisprudence from this celebrated system ; and even with respect to some matters of a more positive nature, the principle of imitation is manifestly discernible. While most of the countries in which the *Roman* law is received with authority, and acted upon as a part of their own immediate constitution, have rejected the formalities of actions, and the several strict and technical rules with which they were accompanied, the spirit of those formalities has prevailed in *England* very extensively ; the allegations in the *Roman* tribunals, with its exceptions and replications, have a great analogy to our science of special pleading in the circumstance of bringing the matter in dispute to a precise and distinct point of affirmation and denial ; although, with respect to verbosity and compression, the two systems are distinguished by a striking contrast and opposition ; but in most other countries, the statements of the opposite parties are entirely informal, and often leave the matter in variance very indistinct and unintelligible. The necessity that engagements, to acquire an obligatory force, should either be founded upon an adequate consideration, or be marked by a certain peculiar solemnity, is common to *England* and *Rome* ; the effects of a deed in the one are very similar to those of a stipulation in the other ; and the term *nudum pactum* is adopted from the ancient system into the modern, to denote the invalidity of an engagement not attended by either of these essential requisites ; but this doctrine does not prevail in most of the modern systems. The functions of the prætor in committing causes to the decision of judges appear to have a resemblance evidently more than accidental to the office of the chancellor, in issuing original writs ; the jurisdiction of the same officer in mitigating the strictness of law, is the professed and avowed object of imitation in the *English* pro-

(a) It is suggested to me as this sheet is passing the press, that there is a valuable work by Mr. *Howard* illustrative of the conformity of the *Norman* and *English* law of real property.

ceedings in equity. I apprehend that the excessive jealousy which formerly prevailed with respect to the law in question, so as to render even the knowledge of it almost a matter of terror, is now pretty generally dissipated; but there still appears to be a disinclination to the study of it, while at the same time many of the particular cases in which it has been resorted to for the purposes of illustration, are acknowledged to form some of the most valuable materials of our judicial system. Perhaps the excellent commentaries of Sir *William Blackstone* may not have been wholly inoperative in continuing the former prejudice; for although he very sufficiently acknowledges the general merits of the *Roman* law, he frequently takes the opportunity afforded by particular subjects, of placing in a conspicuous point of view the superiority of the laws of *England*; a circumstance which, in referring to, I by no means offer to censure, for it is clearly the attribute of a valuable member of society to render his fellow citizens duly sensible of the peculiar advantages of the constitution under which they live. If the design of effectuating this purpose has been the cause of exciting a less favourable impression of a different system than is consonant to its real excellence, or of repressing a disposition to cultivate it with an adequate attention, it is certain, as well from the example as from the more direct opinions of the learned commentator, that the consequence is merely contingent and accidental. Beside the more general analogies which have been above alluded to, and beside the acknowledged excellence of the civil law, regarded only as a collection of written reason, it must be recollected that certain courts in *England*, and the ordinary courts of *Scotland*, acknowledge the course of that law as the general basis of their proceedings; and although the discussions in the first instance are conducted by advocates particularly connected with the courts referred to, the inquiry in the last resort admits the participation of advocates and judges of the *English* law; and with respect to cases arising in *Scotland*, the argument and decision are for the most part entirely under the management and direction of *English* lawyers.

It would be superfluous to dwell at length upon the characteristic excellencies which distinguish the administration of the law of *England*, and which have been the subject of such just and general admiration. The appointment to judicial situations is founded upon a long experience in the practice of the law, upon a well established reputation of learning, ability, and integrity: the very suspicion of impurity of conduct is a sentiment which never enters for a moment into the most heated imagination; the interference of the executive powers of the state is absolutely unknown; all judicial proceedings are conducted with the most perfect publicity; and the

general mass of the community have an extensive participation in the application of those laws, to the operation of which all are equally subject, and the purity of which every member of society has an equal interest to preserve; a participation which is not a favourite distinction conferred upon particular individuals, but an honourable duty, which every person possessing a very moderate portion of real property is in his turn called upon gratuitously to discharge, a duty which in the immediate exercise of it may slightly affect the convenience of the individual, but which adds to his general importance in society, which enlarges a valuable familiarity with his rights and obligations, and which is effectually compensated by the security that he derives from the exercise of a similar duty by those who have a common interest with himself in the fair and equal distribution of justice. It appears to me that whatever defects may accompany the administration of the law, they result either from the natural infirmities of temper which are inseparably connected with human nature, and which no constitution of government can entirely prevent the effect of, or from circumstances that may be obviated in a manner perfectly consistent with the spirit and principles of the existing system. Whatever may be the frame and constitution of the law itself, the complexion of it will in some degree be necessarily affected by the particular habits and dispositions of those who are intrusted with its exposition; and of course will fluctuate according to the different characters of those on whom that distinction may be successively conferred. To preserve a proper medium between too rigid and inflexible an adherence to precedent and authority, too strict and literal construction, and too unlimited a discretion, is an object which requires the most accurate judgment and the most assiduous attention; with whatever propriety this medium may commonly be observed, there will occasionally be some deflection from it, and the deflections of the same individual, be the frequency of them greater or less, will for the most part be influenced by the general bent of his disposition; and from the inclination on the one side or the other, a certain fashion will arise, which cannot be wholly prevented, but which it is desirable as far as possible to correct. The most effectual means of accomplishing this purpose, will be by a habitual consideration of the principles which connect the latitude or strictness of judicial discrimination with the general interest of the community. The effects of requiring precedents, of adhering to precedents, or of deviating from precedents, of investigating or foregoing the investigation of principles, differ in infinite degrees according to the infinite variety of subjects, and no reasoning can be correct which attempts to decide the subject
universally

universally and indiscriminately by the application of a general rule. In the absence of precedent, the recurrence to principle is a liberty which is pretty commonly admitted ; although to what extent the admission shall be carried is a subject upon which there is much diversity of opinion. Wherever an opposition to precedent is proposed, the discussion of its propriety must assume the supposition that the precedent is contrary to principle, for otherwise there is nothing in dispute ; as if it is contended that the principle and the precedent are in unison, the argument assumes a different shape and turns upon an entirely different question. I conceive that nothing can be more repugnant to a true conclusion upon this subject, than the attempting to fix an universal rule as applicable promiscuously to all kinds of cases ; and that nothing, on the contrary, can tend more essentially to the correct exposition of the subject, than a due attention to the effects which would result from the adherence to an erroneous precedent, or set of precedents on the one hand, or a deviation from them on the other, and a careful examination of the preponderance of detriment or advantage, as applied to the different and opposite subjects upon which the question may be proposed. I have in various instances, in the following sheets, entered into particular discussions with reference to this principle, and have upon one occasion dilated upon the subject with considerable particularity. The leading points which appear to me to deserve consideration are, 1st. Whether the precedent is merely referable to arbitrary questions of positive law, or affects the general principles of right and justice. 2d. Whether the consequences of a recurrence from precedent to principle will have the effect of disturbing property held under a confidence of the existing state of the law, or will chiefly have a mere prospective operation by correcting in future what has been erroneous in the past. Fully agreeing that the general presumption is in favour of the rectitude and propriety of the precedent that has been established, and that it is incumbent upon those who assail it, to demonstrate its impropriety, I conceive that the spirit of adherence is often carried too far, that the admitted presumption is too often rested upon as an absolute conclusion, and that arguments submitted in opposition to it are repelled with too frequent acrimony, and without an adequate attention to the several considerations which are properly calculated to influence the decision. On the other hand, when a spirit of reform happens to be the prevailing sentiment, sufficient attention is not always paid to the propriety of retaining what might have perhaps been otherwise more judiciously arranged at first, but cannot now be subverted without inducing greater prejudice than advantage.

It may have the appearance of presumption to advert to the duty of affording to every advocate of every party an equal and impartial attention, and of requiring equally from all the same respectful deference; to allude to the impropriety of admitting an almost dictatorial familiarity from one, and repressing another by a mandatory authority or a supercilious indifference, whatever may be the difference between their respective ranks and talents; or to imagine the possibility of private intimacy being allowed to influence the reciprocal demeanour of the advocate and the judge. I firmly believe that all who have occupied the higher stations in the administration of justice, for a long succession of years, would justly revolt at the suggestion of having knowingly or intentionally afforded a subject for the application of such reflections. That similar effects have not occasionally resulted from inadvertence, I cannot equally affirm; and without insinuating the slightest reference to particular circumstances or persons, it is difficult to believe that the imputation of a particular advocate having the ear of a court, which is not unfrequently applied in fact, is always applied without foundation. The unfavourable influence of such a preference upon the due administration of justice must be extremely manifest; and the duty of guarding with anxious solicitude against its unconscious and inadvertent operation cannot too extensively awaken the attention of even those depositaries of public justice who would have the most indisputable right to repel with indignation the charge of intentional partiality. The same considerations will apply to giving a countenance in any other manner to the assumption of an undue superiority by one advocate over another, and the encouraging an imperious and dictatorial tone, with respect to the discussion of matters in dispute between them. Although it must be allowed that any such consequences will in superior courts be in a great degree prevented by the wisdom of the judge, yet the thing sometimes does exist, and when it does it militates against that equal and impartial distribution of justice which should be preserved with the most anxious circumspection, not only against those manifest encroachments which are open to immediate observation, but also against the more dangerous influence of causes that are only counteracted by vigilant attention, and are not accompanied by any intentional misconduct.

There are certainly many things incident to the situation of a judge which have a great tendency to fatigue the patience and irritate the temper; but in proportion to the internal tendency of any situation to excite particular infirmities, is the vigilance which it is requisite to apply in their correction; the petulance and ill temper of a judge are not the ridiculous and insignificant weaknesses

acts of an individual, but a trespass on the rights of the public, which may be attended with consequences of the most extensive and permanent nature. But whatever necessity there may be for correcting the casual aberrations arising from particular infirmity, the subject acquires a great additional importance, when a similar objection can be applied to a prevalent system, and a connected principle. I allude to the excessive eagerness for expedition and dispatch, which is often regarded as the highest mark of judicial excellence, and which is sometimes indulged to a degree that most essentially affects the dignity and interests of justice. No person has less inclination than myself to commend a dilatory and trifling prolixity in the administration of the law, or to withhold a proper approbation from any arrangements which may promote its celerity, so far as that object can be obtained consistently with the due preservation of its more important advantages. I cannot however but think that a greater degree of rapidity than this principle warrants not only has a frequent existence in practice, but too generally attracts an approbation to which it certainly is not entitled. This course of procedure may increase the advantage of the law as a trade, but can never promote the honour of it as a profession, or advance the excellence of it as a rule of conduct, or an instrument of justice. I think I shall not be suspected of wishing to encourage a disposition in advocates to consume unnecessarily and therefore improperly the time in which the public have so extensive an interest, or to claim a greater portion of that time than is requisite for the fair and adequate support of the interests for which they are engaged, and the exposition of the general principles of law and justice with which those interests are connected; but parties have a right to claim the serious and deliberate consideration of the topics which it is thought material and important to present on their behalf. No man should have an opportunity of asserting with truth that his arguments were flurred over with hurry and neglect. The earnestness to save a small portion of time may, contrary to the real demands of right and justice, involve a family in ruin; an effect which will most frequently occur in cases where the mere amount of the property in dispute is the most trifling and insignificant.

As the expressions of a judge in a particular case become afterwards a rule of law, they should be weighed with cautious accuracy and with full consideration of all their consequences, so as to prevent the mischiefs that must arise from exalting an error into a principle. The strongest opinions upon momentary impression are not always found to be the most accurate upon deliberate reflection; but after the impression has been peremptorily acted upon,

the reflection may come too late to afford an effectual remedy (a). The pleadings of *D'Aguesseau*, as Advocate General, among their other excellencies, contain a striking illustration of the principle, which I am endeavouring to inculcate; it is impossible to read any of those compositions, without perceiving that no argument which had been deemed material by the parties was dismissed without a deliberate examination, or with no other notice from the advisers of the court, than a captious interruption, or a contemptuous sneer. The feelings of personal interest might render a party dissatisfied with the reasons which were assigned for an opinion in opposition to them, but he never could complain that he had not been fully heard, or, that having been heard, it was only to be treated with derision, acrimony, or neglect. The course of proceeding never produced any of those scrambles for attention, which certainly are not unknown in the *English* tribunals. Perhaps it may be thought with truth that the immense quantity of business which is brought before our courts would not allow a perfect imitation of that full and minute exposition of the arguments of the parties, which appears in the pleadings alluded to; and the difference between the functions of an assessor, who is to elucidate all the points which may be material for the consideration of the court, and that of the judge, who, if any one point is sufficient to warrant a decisive conclusion on either side, may dispense with examining the others, will in many cases render it superfluous; but the spirit and temper of them may be recommended, where the precise mode and form of their arrangement cannot or need not be applied. The prevalence of that attachment to celerity, which may sometimes not undeservedly incur the charge of precipitation, must in a great measure be ascribed to the vast quantity of business which a very small number of persons is appointed to discharge, and which absolutely demands that every regard should be paid to expedition, which is not attended with the prejudice of justice.

When an argument is conducted by the advocates engaged in it upon certain principles, I think it is very seldom beneficial for the court to ground its determination upon some detached consideration kept in reserve by themselves, and which would perhaps have admitted of explanation or correction, and even upon due attention

(a) I conceive that the publication of *Nisi Prius* determinations and the admissions of them as legal authorities, may be attended with considerable detriment, unless the use of them is regarded only as evidence of the familiar course of practice, or as illustrative of the principles of accurate reasoning; to consider them as binding, in opposition to what, upon investigation, may appear to be the true legal conclusion upon any subject, would be giving them a station to which they have no pretensions on the ground of utility.

may have been declined by the council as irrelevant to the real question in dispute. The fair and correct course, when observations occur as material, which have not been adduced in argument, is to suggest them to the attention of the counsel, and to allow them to receive a full and unprejudiced discussion.

Wherever the nature of the subject will admit the facts to be ascertained, and the law resulting from them to be reserved for more serious consideration, it is extremely desirable that the judge should not stop the course of proceeding in a trial, on account of his own impressions of the law, since if he commit an error in admitting the investigation of the facts to proceed, the only injury which can arise, is an unnecessary consumption of time; whereas, if he erroneously intercept the course of inquiry, he occasions an unnecessary, and frequently a very detrimental expence and delay in the renewal of an examination, which might have been perfected without prejudice in the first instance. Every court should always study to promote such an arrangement, as will have the effect, if their own original sentiments should be wrong, of admitting the consequences of them to be rectified with the greatest facility.

The law has in most cases afforded the parties engaged in litigation, an opportunity of a solemn and full discussion of any legal questions, connected with, or affecting the matter in dispute. The general disposition of the judges to allow such discussions, whenever the legal advisers of the parties are of opinion that there is a proper ground for it, has very much brought into disuse the proceeding by which the same effect is in the power of the parties themselves, and a bill of exceptions is so little in use, that although it is avowedly no mark of disrespect to the judge, whose opinion it subjects to further inquiry; it is, when resorted to, almost always accompanied by an apology. Sometimes, however, judges decline allowing the reservation of a case upon points which counsel, after deliberate consideration, conceive to be material; and upon applying for a new trial, the report, from the hurry and confusion which frequently accompany a trial at *Nisi Prius*, does not always fully enable the party to obtain the advantage which he would have had, upon the more formal mode of taking his objection; and even the discussion in the superior courts is now and then conducted more summarily and with less attention than it would be, if subject to further revision. The expence of a bill of exceptions is sometimes objected to, but I much doubt whether it is not commonly exceeded by that of a second trial at the assizes. The principal defect in taking this course is that it can only be rendered available upon a writ of error, and I conceive that a considerable improvement might be introduced by admitting a note of an objection

objection to be tendered at the trial, with liberty to turn it into a bill of exceptions, in case of an adverse decision.

It has sometimes been regretted by the court of King's Bench, that justices in quarter sessions, who exercise an extensive though not a very conspicuous authority, should not be under a legal obligation to submit their opinions to reconsideration; but *Lord Kenyon*, recently before his death, rather intimated a disapprobation of the facility with which such revision was allowed, and expressed a wish that justices would not suffer cases to be reserved, except where they entertained a doubt upon the point which they decided. I have had an opportunity of seeing this opinion very extensively acted upon, and cannot but think that the magistrates would act at least as judiciously, in presuming that persons of professional knowledge and experience would not require such revision without an adequate motive, than in taking for granted the absolute infallibility of judgments pronounced upon the impression of the moment, in courts where legal science is certainly only an accidental quality, and where the determination often depends not so much upon the superior reason of the case, as upon the superior adroitness of the advocate engaged in it. The greatest degree of confidence is not an infallible criterion of the greatest degree of accuracy; and in practice I have commonly found the greatest readiness in admitting a revival of their opinion, in those who were possessed of the greatest rectitude of judgment; and I may add, that I have seldom seen that facility abused by improper applications. In this reference, as well as in many others in the following pages, to courts of quarter sessions, I am influenced not so much by any considerable importance in the immediate subject as by a reflection upon the extensive principles which ought to actuate the administration of justice in all its ramifications, and the deviations from which are best illustrated by instances produced from sources, in their nature more peculiarly subject to them.

It is certain that the great principle of *Magna Charta*, *nulli negabimus, nulli vendemus justitiam*, is too often frustrated, in consequence of the expence, at which alone the claims of justice can be attained, and that the maxim, that the law is equally open to the rich and the poor, will too frequently admit the reply given by *Mr. Horne Tooke* to *Lord Kenyon*, that "so is the *London* tavern;" the obtaining a verdict for a debt of forty shillings is often attended with an expence of more than forty pounds, when possibly the only fruit of it will be, the imprisonment of the defendant's person; so that, according to common prudence, it will be generally more adviseable to forego a just claim, or to submit to an improper demand for a moderate amount, than to agitate the question in a judicial contest. A notion is sometimes entertained that it is desirable

frable to render the law expensive and inaccessible in order to prevent and repress the spirit of litigation; this is merely an instance of the common error of arguing against the use of any subject, from the abuse by which it may be perverted; and the argument, if true in principle, would go the length of excluding the interference of the law altogether. I agree that it is desirable to discourage a wanton and vexatious habit of litigation as extensively as a due and proper attention to the effectual preservation of right and justice will admit, but further than that it is impossible to proceed without inducing the consequence that has been mentioned; and any arrangement which may prevent the failure of justice from an apprehension of expence, must in its general effect be a desirable object.

In almost every country there is a provision for allotting causes to different tribunals of greater or inferior dignity, according to their relative value or importance; the attention of the higher courts being confined to subjects which have a certain degree of magnitude. To advert to countries, the laws of which have a connection with, or relation to, those of our own; in *Ireland* there is a process called civil bill, for recovering in a summary manner, before barristers appointed with a salary for every county, all debts under the value of 20*l.*: in *Scotland*, the sheriff, who is always an advocate, is a judicial officer with a permanent appointment, and has cognizance of civil causes to a considerable amount: in *America*, debts under the amount of ten pounds are recoverable before justices of peace.

In most corporate towns in *England*, civil justice is administered at a comparatively inconsiderable expence; and nothing can be more clear than that the same effect might be generally and effectually obtained, with very great facility, in respect to the country at large, in perfect conformity to the existing laws and constitution, by merely correcting the effects that have resulted from the long efflux of time since the present distribution of legal authority was established, by giving to the county court, directly and immediately, that jurisdiction which it already possesses derivatively by a writ of justices, by rendering its process effective in attaching to it the general incidents of a court of record; and substituting for the assistance of the person who may happen to have the appointment of under sheriff, the regular attendance of a professional judge selected by the crown. One of the great effects of such a regulation would be, affording an opportunity to the judges of the superior courts to apply a larger portion of time to the more important cases to which their inquiries would be confined, than can at present be allowed, amidst the multiplicity of business, from a
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great portion of which they might be relieved without the slightest detriment to the public.

To object to any such arrangements on the broad ground of discouraging innovation, would be completely ridiculous, provided the measure upon fair examination should be found to have the prospect of real utility. It has long since been observed by one of the most enlightened of mankind, that the greatest innovator is time. Refusing to adapt a change of conduct to a change of circumstances, is as little consistent with wisdom, as offering to continue for the man the measure of habiliments which was suited to the boy.

Considerations of œconomy are still less calculated to interfere in the scale of reason with the admission of such regulations, as upon a fair and correct inquiry might appear to be useful and judicious. Œconomy and prudence do not depend upon merely counting the sum of money which is appropriated to any beneficial purpose, but upon proportioning the amount of the expence to the value of the object; the refusing to incur a small expence for the purpose of obtaining a great advantage is not frugality, but imbecility. There can be no doubt but that the real advantage of justice will be promoted, by acting with a spirit of liberality to those intrusted with the administration of it, and that a due and adequate encouragement to useful services is more than compensated by its natural effects. But to speak of restraints of œconomy upon the present subject, would be quite absurd. The public have an important interest in the easy acquisition of justice: the persons actually engaged in litigation are comparatively few; but no one can tell that he is not the man, on whom the lot may fall to be placed in the alternative of losing an actual right, or submitting to a wrongful claim on the one hand, or of incurring a disproportionate expence on the other. Considering the charges which attend the administration of justice, as a matter of public concern, without making the distinction whether they are sustained by a general fund, or by the particular individuals who may have occasion to claim the protection of the law; the debtor and creditor account would present a saving, by making such a general provision as would diminish the aggregate charge of individual expence; and the amount of that saving produced by the alterations alluded to would be almost incalculable; and to the advantage of a saving in expence, that of preventing the frequent failure of justice would be a most important addition. When we advert to the actual amount, which would be requisite for the various purposes that have been alluded to, we shall easily be convinced that the mere interest
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for a single year of a sum which is often without emotion raised in the temporary exigencies of the state of war, would be more than adequate to establish a permanent fund, sufficient for completely meeting every expence that can be incurred by improving and ameliorating the system of the law, for providing with the greatest liberality for those who may be engaged in its administration, and compensating the losses which might be occasioned by the alteration, and consequently that an annual charge equal to the annual interest of that sum would be attended with the same effect. If the pressure of war is an acute disease which requires a strong and instantaneous remedy, the effectual and easy acquisition of justice is a part of the daily food which contributes to our activity and comfort.

With respect to the study of the law of *England*, although a liberal course of education has been generally recommended and extensively followed by its professors; it certainly cannot be pretended that it has been immediately conducted upon the principle of considering it in itself as a liberal and general science, until the recent era of the publication of *Blackstone's Commentaries*; a work allowed by general assent to afford a more beautiful specimen of elegant literature than has in any other instance been applied to a professional subject, which has greatly facilitated the acquisition of juridical knowledge, while it has improved the judgment of mature experience, and given a convincing proof to the cultivators of general literature, that if the science of *English* law has not been often presented in an elegant form, the defect has not been occasioned by the nature of the subject. It is to be regretted that several other productions which, without affecting to challenge a competition with the admirable composition already mentioned, are very extensively calculated to promote the same desirable purposes, have not met with a reception proportionate to their merit and importance; the works which more particularly call for this observation, are the Lectures of Mr. *Sullivan* and Mr. *Wooddeson*, the History of the Law, by Mr. *Reeves*, and the pleasing Dialogues of *Eunomus*, which relate to the subject of the law considered on an extensive scale; to which, with reference to a particular topic, may be added, the Considerations on the Law of Forfeiture, by Mr. *Yorke*. It seems to be very much taken for granted that all elementary knowledge not derived from *Blackstone* is superfluous, and that after drawing from this rich fountain, any recourse to inferior sources would be almost detrimental; but whoever feels a disposition to avail himself of the example of Sir *William Blackstone*, as well as of the fruits of his talents and application, will, to an assiduous cultivation of the legal

gal authorities of his own country, add a considerable attention to the culture and illustrations of the more general principles with which the legal authorities of every country are intimately connected.

It is sometimes mentioned, as a matter of preference to the science of *English* law, that its authorities are not derived from the speculations of writers in the closets upon theoretical suppositions, but from the decisions of the bench upon actual subjects of litigation between conflicting parties. I am perfectly ready to accede to the correctness of the principle upon which this preference is founded, and upon the abstract question between adopting in practice the previous determination of a judicial tribunal upon the immediate proposition on the one hand, or the private sentiments of a juridical writer on the other, (the adequacy of talents being regarded as equal,) I think there can be no rational ground of dispute; since the very important purposes of legal certainty are greatly promoted, by giving to the former a kind of legislative authority, which shall not require any argument or ratiocination, in their support, but shall only be subject to correction when acknowledged upon due consideration to be founded upon erroneous principles. But I think the preference is carried too far, when it indicates a spirit of exclusion, since in point of reasoning the deductions of the writer (the same supposition being always assumed) will be of equal accuracy with those of the court; and although the superiority in case of conflict may be justly attributed to the latter, material advantage may in other cases be derived from the concurrence and assistance of the former, who does not require an implicit and submissive acquiescence in his authority, but only solicits a fair and candid examination of his reasons, and in some cases the balance in respect of accuracy may naturally incline in favour of the writer whose conclusions are founded upon the deliberate contemplation of an entire subject with all its bearings and relations, rather than of the judge, whose decisions may result from the instantaneous and partial view of it in a particular aspect, presented by the skilful advocate for a different purpose from that of establishing the correct and perfect exposition of the disputed proposition.

That part of the law which depends most upon universal principles and is of the most extensive use and application, the doctrine of personal contracts, has, until a recent period, received a very subordinate share of attention from juridical writers. The writers of the treatises which have contributed to introduce a different system, are yet for the most part at no advanced period of life. The examples which they have afforded of rational investigation and of recurrence to the arguments and illustrations of foreign writers,

writers, may greatly contribute to the advancement of our jurisprudence, by promoting a course of inquiry which will allow to precedents their proper value and effect, without absolutely requiring their assistance or implicitly and indiscriminately relying upon their authority.

The law of *Ireland* is so entirely founded upon the law of *England*, that, subject to a few local peculiarities, it may be regarded as the same. So far as I can speak from general information several legislative regulations have been made in that country, which may be desirable objects of imitation. The published accounts of decisions in the *Irish* courts are not very numerous or important. The relations of particular proceedings which sometimes appear in the daily publications evince that more general cultivation is there applied to forensic eloquence, than can be asserted of the tribunals of our own country.

Nearly similar observations may be applied to the law of *America*. The authorities of the *English* law are received there with great deference, and all the professional publications which appear in *England* are in very considerable request. Some valuable reports have been published, which indicate a scientific and enlightened investigation of juridical questions, and which the lawyers of the parent country need not feel a disgrace in resorting to for assistance. While the discussions of the *American* courts are conducted with reference to the juridical proceedings in *England*, it is obvious that the discussions in the *English* courts may receive a valuable illustration from cases in which similar questions have been agitated with competent ability and with full and adequate attention in *America*, since where the principles are the same, the consequences resulting from a proper deduction will of course be similar. There are also some judicious regulations established by legislative authority, amongst which may be mentioned the power of courts of law to submit the examination of matters of account to referees without requiring the assent of the parties.

In *America* the persons entrusted with the administration of justice, are competent to the functions of legislation; this in *England* is only admitted in so limited a degree, that the effects of the combination can very seldom be detrimental, and may frequently be very beneficial; and I conceive that the general purity of justice is very much promoted, by precluding the ministers of it from diverting their attention from their appropriate functions, in order to become distinguished in the contests of party.

The general legislative provisions of *England* and *Scotland* have, since the union, been very much the same, and the leading principles of the feudal law, which are the foundation of many of the institutions

tions of the former, and still prevail in undiminished vigour in the latter. But, generally speaking, the two systems are entirely separate and distinct; and the law of *Scotland* has at least an equal affinity to the law of *France*, as to that of *England*. The *Roman* law has there been as extensively the model of imitation as in most of the countries on the *Continent*, and the juridical discussions appear to be conducted upon those philosophical principles of general reasoning, which are best calculated to lead to accurate conclusions. The criminal jurisprudence seems to have a vague and arbitrary character, which in many cases renders it inferior to the more certain jurisprudence of *England*, and, as far as can be judged from a slight knowledge of its practical effects, to warrant an assumption of power which little accords with the sentiments of an *English* lawyer. In civil questions, the power of appeal from the courts in *Scotland* to the supreme tribunal of the empire is more extensive than in the other parts of the *United Kingdom*, as it embraces decisions upon fact as well as upon law; and therefore such appeals are of much more frequent occurrence. Perhaps the attaching to the *House of Lords* an official character professionally conversant with the law of *Scotland*; would be found an improvement of considerable value. The *House of Lords* is for the most part with respect to these appeals another name for the *Lord Chancellor*, whose previous habits and studies are not naturally calculated to render him peculiarly intimate with the questions which he is empowered conclusively to decide. A doctrine has lately been stated as proceeding from that high authority to which I think it is impossible to subscribe. Upon a general principle, that the law of *Scotland* and the law of *England* should be rendered as concordant as possible, a decision of the court of session was reversed, because it was at variance from some previous decisions of the *Master of the Rolls*. So far as legal questions depend upon general principles, the law of *England* and of *Scotland* ought to be the same, as well as the laws of all other countries; and if a decision is erroneous, as deviating from those principles, it ought to be corrected by an immediate appeal to the principles themselves; but since the laws of *England* and of *Scotland* are entirely independant with respect to matters of local authority, and as the latter acknowledge no subordination to the former, the mere benefit of conformity is fanciful and insignificant, when attended with the effect of correcting a judgment by a standard to which it had no relation. The *Scotch* and *English* lawyer respectively apply for their information, and the advice which they communicate, to different sources; an *English* counsel, in giving an opinion, makes no inquiries into the opinions of the court of session, or a *Scotch* lawyer into the decisions of the *Master of the Rolls*, except collaterally and incidentally

incidentally as they might apply to any other foreign source of information ; but if the *Scotch* decisions are to be corrected by the decrees of the *Master of the Rolls*, the *English* decisions, unless there is a subordination which will not be contended for, must be corrected in turn by the judgment of the court of session : for between two mutual, independent, co-ordinate authorities, acting upon similar rules and principles, there can be no recurrence to authority, or the recurrence must be reciprocal ; and the *House of Lords* acting judicially has no more constitutional authority to subvert and new model the law of *Scotland*, for the purpose of rendering it conformable to the law of *England*, than the most inferior *English* tribunal has to subvert the law of *England* for the purpose of introducing any alteration which the judge of it may fancy to be an improvement, from the law of *Scotland*.

PART II.

IN making the preceding remarks, I perhaps may have subjected myself to the imputation of introducing a variety of topics, that have no immediate reference to the publication which they are intended to accompany ; but in presenting the treatise contained in the present volume to the *English* reader, my attention has naturally been drawn to a contemplation of the general principles which are calculated to enhance its utility ; to an advancement of the rational cultivation of juridical science, and to the practical improvement which might be admitted in the administration of justice ; and I have availed myself of the opportunity of suggesting some incidental observations, the consideration of which might not be wholly unimportant in pursuing so desirable an object. The leading particulars of the discussion cannot aspire to the praise of novelty, and I am perfectly conscious that they have repeatedly been presented with much superior ability. To expect that my own endeavours can be attended with effects that have hitherto but very imperfectly resulted from the exercise of talents which I contemplate with distant admiration, would be unwarrantable arrogance and vanity ; but as I can at least assert the merit of entertaining a strong attachment to the proper objects of my profession, and to the pursuits by which its value and excellence may be most successfully promoted, I have, according to the best of my power, presented my contribution to the accomplishment of so desirable a purpose.

Upon some of the topics alluded to in the foregoing pages, I of course can only profess to speak from a superficial and cursory acquaintance ; upon others I have hazarded observations which have no higher authority than my own personal suggestions ; but I hope that I have not materially incurred the charge of inaccuracy of statement, or of offering assertions or remarks which have not been preceded by a fair and attentive consideration.

For the treatise, of which I now submit a translation to the public, any expressions of commendation would be manifestly superfluous. The stamp of approbation from Sir *William Jones* is a decisive criterion of the sterling excellence to which it is affixed ; and if my own share of the publication is intitled to the humble praise of fidelity, I shall not be expected to offer an apology for my endeavour to second the intentions of that illustrious character, who declared, as the result of his pre-eminent erudition, that he should consider himself as having in some degree discharged the debt, which every man owes to his own profession, if his undissembled fondness for jurisprudence should never produce any greater benefit to his countrymen than an introduction to the writings of *Pothier*.

So far as this indisputable testimony can be assisted by any confirmation, it has the advantage of being supported by subsequent writers, who have regarded the science of law as requiring the application of other exertions, than the mere compilation of municipal authorities, and have deemed it beneficial to enrich their treatises from the treasures of foreign erudition, and some recent instances have occurred, in which the opinions of *Pothier* have been cited with approbation in the course of our judicial proceedings ; but notwithstanding the acknowledged utility which would accompany the study of his writings, I conceive it is perfectly evident that the actual familiarity with them bears a very inconsiderable proportion to their merited celebrity.

It appeared to me that the utility of my undertaking would be increased by inserting the Eloge, which was pronounced recently after the death of *Pothier*. Compositions of this kind, after making every proper allowance for the attachments of friendship, and the colourings of professed panegyric, are calculated to afford a considerable idea of the person who is the subject of them ; the likeness may be taken in the most flattering point of view, but the object would be defeated if the general resemblance was not preserved ; and in the present instance, the representation which is transmitted to us is equally valuable as containing a perspicuous exposition of the labours of the jurist, and a lively and interesting portrait of the man. A sincere and ardent devotion to the duties
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of religion, a peculiar simplicity and benignity of disposition, a great disinterestedness of conduct, a strong attachment to the duties of his station and the improvement of the science with which it was connected, are the leading features. The enumeration of particular instances confirms the testimony of general excellence; and although the style and language of the commendation may be in some instances too inflated, the substance and effect of it are manifestly beyond the reach of suspicion.

The presidial in which *Pothier* held a seat was a court of subordinate rank; it exercised jurisdiction without appeal in cases of smaller value than 250 livres, which about the time of his decease was extended to 2000, but I conceive that it had original jurisdiction subject to appeal in cases of greater amount; it appears also from the Eloge, that it likewise exercised an authority in criminal cases. It is a striking instance of the effect of habit, when we see the friend of *Pothier*, and the admirer of his humanity, speak of his inability to behold the infliction of torture, as resulting more from the sensibility of physical organs, than from moral sentiment.

At a more advanced period of his life, *Pothier* received the appointment of professor of law in the university of *Orleans*, a situation for which he was peculiarly qualified, and in which his instructions justly advanced the university, as a seminary of juridical science, to a high degree of celebrity.

During the course of a long and useful life, he devoted himself to the performance of the duties in which he was engaged, with an unremitting assiduity, which is particularly delineated in the Eloge, and of which we very rarely meet with any similar instance.

I have already adverted to his edition of the *Pandects*, which, so far as a judgment can be formed from the representation of it, must be more completely adapted to obviate the extreme confusion and want of arrangement that pervade the *Roman law*, than any of the numerous publications which have been devoted to that extensive subject; I regret my inability to speak from any personal acquaintance of a work, the merit of which must indisputably intitle it to a more extensive encouragement, and in consequence to a more general publication.

With respect to his writings which have a more peculiar and immediate reference to the municipal institutions of *France*, and in particular to the customs of the province of *Orleans*, it will not be necessary at present to make any further observations, than that they are universally admitted to indicate the same degree of talent, which in his other writings is applied to subjects of more extensive interest.

The most valuable and important productions of his pen are acknowledged to be his Treatises on Obligations, and on the different Species of Contracts. The first of these treatises embraces the general principles, which in the others are traced in their particular application, to more confined and subordinate subjects.

In the discussions of the various topics which fell under his consideration, his inquiry embraces the common principles of natural justice, the decisions and institutions of the *Roman* law, and the more circumscribed jurisprudence of his own country, particularly illustrated by the usages of his province of *Orleans*. His inquiries are every where distinguished by their complete and perfect exposition of the subjects to which they relate, by their extensive learning, by their accurate arrangement, the perspicuity of their diction, the felicity of their illustrations, their fair and judicious examination of controverted questions. By some this fullness may perhaps be considered as redundant, and in a few instances the familiarity of the illustrations may excite a ludicrous impression, as when he refers to contracts, which being of a personal nature, determine with the death of the party, and adduces the instance of a contract with a barber, to shave a person twice a week at his country house.

The elegancies of composition received a very slender portion of the author's attention, and every other consideration was regarded as subordinate to the affording a clear, precise, and accurate familiarity with the subject under examination.

To an *English* reader the name of the principal treatise would have conveyed a more extensive idea, if the term *Contracts* had been substituted for that of *Obligations*, as we are familiar with the latter term, in a more confined application of it; but the object of the treatise is, to comprize the general doctrines which relate to the obligations between one individual and another, as well for the reparation of injuries, as for the performance of engagements. The principles applicable to obligations resulting from contracts, however, constitute the leading subject of the author's attention, and the reference to other topics may be considered as subordinate and incidental.

After a short preliminary article describing the import of the term *Obligation*, as denoting a legal tie which imposes a necessity of doing or abstaining from doing any act, and as distinguished from imperfect obligations, such as charity and gratitude, which impose a general duty, but do not confer a particular right, and from natural obligations, which have a definite object, but are not subject to any legal necessity, the treatise is divided into four parts, of which it may not be superfluous to offer a
slight

light analysis, wherein I have endeavoured to facilitate the perusal of the treatise by the exposition of some terms, and the explanation of some points of law, of frequent occurrence.

The first part, which relates to the essence of OBLIGATION and its effects, is divided into two chapters. The first of these is referable to the essence of obligations, which requires that there shall be a cause from which the obligation proceeds, persons between whom it intervenes, and something which forms the object of it. The first section of the chapter relates to contracts, which are the most frequent causes of obligations. An agreement arises from the consent of two or more persons to form an engagement, or to dissolve or modify an engagement already subsisting; and a contract is defined to be an agreement, by which two persons or parties mutually promise, and engage themselves, or one promises the other to give him something, (which term is understood as equivalent to transfer and deliver, and not as denoting any gratuitous donation,) or to do or abstain from doing any act; and a distinction is made between contracts, and promises not intended to constitute any obligatory engagement, such as those made by a father for any indulgence to his son.

After pointing out the difference between a contract and a solicitation, which means the offer of a promise before it is accepted and while it may be retracted, the author proceeds to take notice of three things, which are to be distinguished in every contract: those which are of its essence; those which are of its nature; and those which are accidental. These distinctions relate principally to particular modes and classes of contracts, such as sales, loans, &c. in which the absence of what is of the essence of any given contract prevents that contract having an existence, and either renders what purports to be a contract wholly void, or proves that it belongs to a different class. Whatever is of the nature of a given contract is implied and understood without being particularly mentioned, but may be expressly excluded; accidental circumstances are those which are not commonly implied, but may be introduced by positive stipulation.

This is followed by adverting to the several divisions of contracts: 1st. Into *reciprocal*, where each party is mutually obliged; and *unilateral*, where the obligation is wholly on one side, as in the case of a loan of money. 2d. Into *consensual*, which are formed by the mere agreement of the parties; and *real*, in which an actual delivery of some thing, (*rei*), was absolutely requisite as a pledge or deposit. 3d. Into contracts of *mutual interest*, contracts of *beneficence*, and *mixed* contracts; the first of which are subdivided into *commutative*, where each party intends to receive a full and absolute

absolute equivalent, as sales; and *aleatory*, where something is given on the one side for incurring a risk on the other, as insurance.

4th. *Principal* and *accessary* contracts. 5th. Contracts, which are, and those which are not, subject to particular forms. A discussion follows, respecting the several defects or vices that may occur in contracts, being, 1st. Error. 2d. Force. 3d. Fraud. 4th. Inequality, as between persons of full age. 5th. Inequality, as affecting minors. 6th. The want of a good consideration wherein reference is made to the illegality of contracts, but an intention of gratuity was allowed as a sufficient consideration. 7th. Want of obligation in the party contracting, or, in other words, an agreement giving the party an unrestrained liberty to perform his agreement or not. The more important of these defects are treated of with considerable particularity. The next article relates to persons capable of contracting, or incapable, whether in consequence of natural imbecility, such as ideots; or legal disability or protection, such as married women without the authority of their husbands, persons interdicted for prodigality, and minors. The ensuing discussion respecting the objects of contracts, is principally founded upon a maxim of the civil law, that no man can promise or stipulate (that is receive a promise,) except for himself, inasmuch as contracts have no effect, except as between the contracting parties. This is however rather a matter of technical subtilty and verbal distinction, for it is agreed that a man may personally undertake that an act shall be done by another, rendering himself responsible in case of nonperformance. Several cases are then shewn to which the principle of the objection does not apply, as where the party stipulating has an interest in the subject; where a man stipulates or promises as agent for another; where he stipulates or promises for his heirs and successors, which he is also presumed to do without its being expressly mentioned, unless there is something personal in the nature of the contract; where the matter which concerns a third person is only the mode or condition of an agreement; the power of a man to stipulate a promise through the ministry of an agent introduces a dissertation respecting the nature and extent of an agent's authority, and the rights or obligations resulting from it. Under the title of the effects of contracts, there is only an exposition of the rule, that they cannot have any effect except between the contracting parties, and those succeeding to their interests; the effects which are common to contracts and other obligations being reserved for consideration in the succeeding chapter. Several rules are next given for the interpretation of contracts with suitable illustrations; these rules are rather founded upon

upon general principles of logic and good sense, than upon legal reasonings, and are in a great measure applicable to other subjects as well as contracts. Formerly notaries, who were churchmen, used to make parties confirm their contracts with an oath, for the purpose of drawing a cognizance of them as being spiritual matter before their own tribunals; but this usurpation was afterwards defeated: the obligation in point of conscience to discharge such an oath is examined with some particularity, especially in cases where the oath is procured by fraud or extorted by fear, and in which the learned professor is of opinion that no such obligation is incurred.

The contents of this first section may perhaps be regarded as of more extensive importance and utility than any other part of the treatise.

The second section mentions the other causes of obligations, which are, 1. Quasi-contracts, which with us would be treated by implication, as actual contracts. They differ from contracts, as not being founded upon actual consent; and also differ from injuries. Such are the cases of receiving money which ought to be refunded, the obligation of accounting for business done for another in his absence on the one hand, and remunerating the expences sustained in doing so on the other. 2. Injuries and neglects, or as they are called *Delicta* and *Quasi Delicta*; and 3. Obligations founded upon mere natural or positive law, and not falling within the preceding divisions. The next section respecting the persons between whom an obligation may subsist, does not require any particular notice. The 4th section concerning the object and matter of obligations adverts, 1. To things which may be either particular, as a specific horse; or general, as a horse indiscriminately; they may be existing or expected, as the fruit of the vineyard in the ensuing year, but cannot be things not subject to commerce, as a bishoprick; or things which the party in whose favour the obligation is contracted cannot enjoy, as an easement in his own land. 2. To acts which must be possible in their nature, not contrary to law or good manners, and capable of pecuniary appreciation to the person in whose favour the obligation is contracted.

The second chapter contains three articles: I. Of the effect of obligations on the part of the debtor, considering 1, obligations to give any thing the effect of which it is to give the thing accordingly; 2, in case of a specific thing to use a proper degree of diligence in its preservation; this diligence differs according to the different kinds of contracts, and the distinction respecting the degrees of diligence applied to the contract as being beneficial to both the parties, or only one of

them, which foundation of the great discussion which has taken place respecting the law of bailments, and which may be considered as the great cause of the introduction of the name of *Pothier* to the *English* lawyer; 3, to answer for damage in case of improper delay, which is denoted by being *en demeure*, a subject to which very frequent references are made in the course of the treatise. According to the law of *France* a person was in general only placed *en demeure*, in consequence of a judicial summons, or as it is more frequently called a judicial interpellation.—II. The effect of the obligation to do or not to do any act, is to subject the party to damages, for the contravention of his agreement, or for delaying to perform it, after being placed *en demeure* by a judicial interpellation. II. The effect of obligation on the part of the creditor consists in his right of suing for performance of the engagement. (a) 2. In a right

(a) In the printing of this article the following passages were omitted as being merely of local interest, but upon consideration it has been thought advisable to supply the deficiency by inserting them here.

Page 88. No. [153.] add——“ Observe that if the sale was made by an act before a notary, and the thing sold is any immoveable property, I have a right of hypothecation upon such property for the execution of the obligation, which I may enforce against any subsequent purchaser who is in possession of the estate. He may indeed refer me to a suit against the property of the seller (*a la discussion des biens de mon vendeur*) for the damages to which I may be intitled for the nonperformance of the obligation; but if this suit is ineffectual on account of the insolvency of the seller, the buyer will be obliged to give up the estate by an hypothecatory action, unless he prefers paying the damages.

Page 89. No. [154.]——This right is much stronger than an hypothecation. The creditor of a specific property charged with the satisfaction of his demand, may oblige the person in possession to relinquish the property, without referring him in the first place to the principal debtor, and without having the option of paying the damages for nonperformance.

[155.]——The means which the creditor has of compelling the debtor, or his heirs or universal successors, to give him what is due, are, 1. commandment and execution; 2. simple demand.

The first consists in serving the debtor either personally, or at his domicile by a serjeant, with a command to pay what is due, and upon his refusal, selling his goods to satisfy the demand.

To support this right three things must concur. 1. The debt must be of a certain and liquidated sum of money, or a certain quantity of corn, wine, or the like. (*espèces fungibles*). Observe that although there may be a seizure for a debt of this kind when the quantity is liquidated, there must be an appreciation previous to any sale. *Ordon. of 1667. tit. 33. art. 2.*

2. The creditor must commonly, and when there is no special custom to the contrary, have an executory title, that is either an act before notaries, in proper form, by which the debtor has engaged to pay, or a judgment of condemnation, not suspended by any appeal or opposition.

3. The execution must be against the very person who has entered into the obligation, or against whom the judgment has been given: although his heirs succeed to his obligations, the creditor can only proceed against them by way of demand, unless they have given a new title, or the creditor has obtained a judgment of condemnation against themselves.

When

a right of set off, called a right of compensation where the mutual demands are of liquidated sums. 3. In serving as the foundation for other obligations such as the engagements of sureties. 4. In serving as the foundation of a novation or substantial contract. Art. III. Relates to *damages*, which term in the *French* law is always referred to conjunctly with that of interest, the combination being in fact little more than a mere redundancy. In this article I have preserved the original expression, but in other parts of the treatise have only used the first term. Damages are defined to be the loss which a person has sustained by the gain which he has missed. The principles upon which these damages should be regulated are discussed with considerable minuteness, with reference to their being direct or incidental, and to the distinction between damages resulting from fraud or arising from imprudence and unintentional neglect.

The second part relates to the several *divisions* of obligations which are ranked in a preliminary chapter under seven principal heads; the first of these relates to the nature of the engagement, as being merely *civil*, merely *natural*, or *both* united; the second, to the manner of contracting them, as being *absolute* or *conditional*, *general* or *subject to modification*, with respect to the time of payment, or other circumstances. The third, to the quality of the object, as being obligations *liquidated* or *unliquidated*, *divisible* or *indivisible*. The fourth, to the distinctions between *principal* and *accessory* with respect to the *nature of the engagement*, which is instanced by the delivery of the goods in a contract of sale being the principal, that of warranty the secondary obligation. The fifth, into *primary* obligations, which are the immediate purpose of a contract, and *secondary* obligations, such as a penalty or damages in case of its infraction. The sixth, into *principal* and *accessory* obligations *with respect to the persons* who contract them. Several of these subjects are discussed at length in the following chapter. The last division relates to certain technical distinctions according to the law of *France*, which at the time of printing the translation

When these three things concur, the creditor is allowed to proceed by way of execution, and is not permitted to proceed by way of demand.

Simple demand is the course which is to be taken, when the creditor is not entitled to execution, it consists in assigning the debtor to appear before a competent judge, and obtaining a sentence of condemnation against him.

[156.]—When the subject which is due is a specific thing and the debtor who is condemned to give it has it in his possession, the judge at the request of the creditor may allow him to seize it and obtain possession of it, and it is not sufficient for the debtor to offer the amount of the damage sustained by the breach of his obligation.

I thought it preferable to omit; but as there are some occasional references to them in the course of the work, the omitted passage is here subjoined by way of note. (a)

There are a few other omissions in the translation arising from the same cause, which do not altogether amount to so much as three pages, and are in general noticed at the places where they occur.

One of the subjects mentioned in the note subjoined is very frequently referred to. A special hypothecation is analogous to a mortgage. A general hypothecation resulted from an act or written instrument passed before notaries, and certain other cases appointed by law, and induced a right of compelling payment, according to the order of priority by seizure and sale of the debtors estates.

The second chapter refers to the division of obligations into civil and natural, which, in the *Roman* law, did not entirely accord with the ideas which we should form of these terms: for, on account of certain technical distinctions, many obligations were deemed natural which produced very considerable civil effects, but were merely destitute of a right of action. The subject denoted by *Pothier*, by the term natural obligations, may be defined as moral obligations having a specific object, and which differ from imperfect obligations, such as charity and gratitude, in the circumstances of the latter not having any such definite object; the difference is clearly indicated by observing that a person is not dispensed from the performance of a natural, that is a moral obligation, on account of the person to whom it is due being under an imperfect obligation of gratitude towards himself.

The third chapter, upon the different modifications under which obligations may be contracted, gives a very instructive view of the nature of conditions, of their several kinds, and the circumstances requisite for their accomplishment, and includes several matters of very general application; it also contains a view of the effects which arise from appointing time or place of payment, of a liberty of

(a) Obligations considered with respect to their security and the means of obtaining payment are divided into privileged and not privileged; hypothecatory and chirographary, executory and not executory, obligations (*en corps*) subject to arrest and imprisonment, and ordinary civil obligations.

Privileged obligations are those with respect to which a creditor has a privileged right against all the property, or certain property of the debtor in preference to other creditors.

Hypothecatory obligations, are those which are contracted with the benefit of an hypothecation upon such part of the property of the debtor as is susceptible of it. Chirographary obligations are those which are not so. Executory obligations are those for the payment of which the creditor has an executory title against the debtor. Obligations subject to arrest are those for the payment of which the debtor may be constrained, by the imprisonment of his person. Those in which he cannot be so, are called civil and ordinary obligations. This subject is regulated by the ordinance of 1667.

paying

paying another thing in lieu of that which is the subject of them, and of the doctrine of alternative obligations, by which a person engages to do one of several things; the option belonging to the person who is under the obligation, unless expressly given to the other party. There are some material differences between these two last modes of obligation. If a person is engaged to give a particular horse, with liberty to pay a sum of money in lieu thereof, and the horse dies without his fault, he is liberated from the payment of the money; but the contrary rule takes place in the case of an alternative obligation, which can only be discharged by actual payment, or by both parts of it becoming impossible.

The term obligation in solido, when applied to several creditors, imports that each of them individually and separately may sue for the whole performance of the obligation, and that a payment to one liberates the debtor from the demands of all the others; which kind of obligation was of very rare occurrence. An obligation in solido, on the part of several debtors, imported, that each was solely and individually liable for the whole with respect to the creditor, although they might be intitled and subject to contribution among themselves; this is the common familiar case of several persons contracting a joint and several obligation. According to the *Roman* law, followed by that of *France*, if an obligation was contracted by or in favour of several persons in general terms, each was only intitled or subject to his particular proportion, which is in direct opposition to the rule of the *English* law, whereby upon such a contract the demand in such a case is joint and must be made only by or against the whole. Obligations in solido might result either from the particular terms of the engagement, or from the nature of the contract, or other cause of the obligation, which in certain cases induced a more extensive liability, than was applicable to joint obligations in general. The nature of the obligations of several debtors in solido, is discussed with reference both to the creditor and the several debtors themselves, with considerable particularity.

The ensuing chapter is upon some particular kinds of obligations, considered with reference to the object of them; the first relating to obligations of an indeterminate thing of a particular kind, such as a horse, which may be either absolutely general or limited to a particular class, as a horse in the stud of the debtor; the principal points established upon this subject are, that the creditor does not lose his right, in consequence of any article of the kind agreed upon perishing, unless the whole are extinguished, or unless the debtor has made a valid offer of any one in particular, in which case the risque becomes determinate to that one and falls upon the creditor; the
choice

choice is in the debtor, unless there is a stipulation to the contrary, and in that case the debtor cannot lawfully part with any one of the articles from which the creditor has a right to make his election. There is a discussion which is a striking instance of the subtilty sometimes existing in the *Roman* law, upon the question, whether a horse which belonged to the creditor at the time of contracting the engagement, and which therefore could not at that time be the subject of an obligation to him, might, in case he afterwards parted with it, be given to him in discharge of the obligation.

The other section in this chapter contains a curious discussion respecting indivisible obligations, and turns principally upon points peculiar to the civil law. In speaking of obligations in solido, it was mentioned, that if an obligation was contracted by or in favour of several persons, each was debtor or creditor only for his own portion, unless there was a contrary agreement, and except in some particular cases; the same thing applied where a person left several heirs, each was debtor or creditor for his own individual portion, and each debtor was discharged by paying his own share; and here it may be as well to take notice, that an heir after accepting the succession became personally liable to the obligations of his ancestors, without reference to the sufficiency of the property, unless he was allowed expressly to take the succession with the benefit of an inventory; that the character of heir might be founded upon testament, as well as upon consanguinity, and that it embraced the two qualities in the *English* law, of heir and personal representative; our distribution of real and personal property not having any application, and the terms *real* and *personal* being used in a more general manner, the one as applicable to *things*, and the other to *persons*, and not as referable to different modifications of property. In the case of obligations in solido, each debtor was personally answerable for the whole, but the heirs of debtors in solido were only answerable, as in other cases, for their separate proportions; in case of indivisible obligations, no part of the obligation was in general discharged unless the whole of it was so: this effect was principally applied to cases which would not admit of partial enjoyment; as a right of way, or other easement, which rights are distinguished by the names of servitudes; and to cases which were contemplated by the parties, as having a certain entirety of object, as the building of a house; in other cases the obligation might be rendered indivisible, by express contract. Although very few of the points contained in this section can be referred to, as having an immediate application to different systems of law, there are few passages which can be more justly recommended, as exhibiting succinct and judicious specimens of legal reasoning;

reasoning ; in the same manner, as our doctrine of contingent remainders would be absolutely inapplicable in any other country ; but Mr. *Fearne's* discussion of it may be recommended as an illustration of the perspicuity and spirit which are suitable to juridical discussions in general, and there is no subject so confined, but that the skilful examination of it will induce the developement of principles of general importance, and sometimes principles which are so obvious when stated, that the discovery of them would not appear to indicate the slightest ability, are overlooked in cases where they would be sufficient to put an end to an existing difficulty, *Columbus's* egg affords a very useful lesson to those who imagine that they should discover without assistance, whatever they can see immediately upon its being shewn to them.

The next chapter, respecting penal obligations, contains several points which have a considerable analogy to the rules adopted upon the same subject in the *English* law.

The remaining chapter in this part relates to the accessory obligations of sureties, and others who acceded to the obligation of a principal debtor, and contains much valuable information. The term *judejussores* or *cautions*, imports a distinct obligation, accessory to a preceding or contemporary obligation, of the principle of which it assures the performance : if two persons concur in contracting the obligation, although between themselves, the engagement of the one may be merely entered into for the sake and in behalf of the other ; the particular system which prevails with respect to sureties, does not seem to be applicable so far as concerns the creditor. The points established respecting sureties are the following : that there must be a valid principal obligation, that the surety cannot be bound for more than the principal, but that he may be bound for less, and upon terms more beneficial ; that the extinction of the obligation of the principal induces the extinction of that of the surety ; that the surety may take advantage of exceptions to which the principal is entitled, with respect to the nature of the contract, called exceptions *in rem*, such as fraud, or violence, but not of exceptions founded upon any personal privilege. By the *Senatus-Consultum Velleianum* of the *Roman* law, women were protected from engagements, which they entered into as sureties. This law was received in some of the provinces of *France*, and rejected in others, and some important discussions are introduced respecting the effect of the law, in case of a woman residing in one province, and having property in another. In examining on whose behalf an obligation may be contracted as surety, we meet with one of the numerous instances of stating what may appear rather superabundant, when it is mentioned that a person cannot become surety

surety for or to himself; and the *Roman law* is cited as an authority in support of the proposition.

The surety when called upon for payment has a right to require the creditor to proceed, in the first instance, against the principal at the expence and risque of the surety. This right is called the exception of discussion. When one of several sureties was sued, the others being solvent, he had a right of compelling the creditor to divide the obligation among the respective debtors; this is called the exception of division, and both these rights are particularly considered.

The surety upon payment of the debt might have recourse against his principal, either as standing in the place of the creditor and exercising his right, or on his own account. The former of these powers (which was often very important in retaining a priority of hypothecation,) could only be preserved by requiring a subrogation, or assignment of action at the time of payment. The second was a common action, analogous to our action for money paid by the plaintiff for the use of the defendant; the circumstances which are requisite to maintain this action are fully stated. In some cases the surety had a right to compel payment by the principal before he was himself proceeded against. There is a particular article allotted to the question, whether the surety for the payment of an annuity can oblige the debtor to redeem it; and the conclusion seems to be in favour of that right, after a considerable duration of the annuity. The reference to annuities (which are called *rentes*;) is very frequent. By the law of *France*, all loans upon interest were usurious and illegal; supplies of money therefore were obtained by the sale of annuities, which in general did not cease with the death of either party, (for an annuity confined to the life of a party was particularly denoted by the term *rente viagere*) but continued as a permanent obligation against the heirs; the price was limited by law, so that the annuity could not, according to the last ordinances, exceed the amount of five per cent. on the purchase, the seller who was called the debtor of the annuity, was at any time entitled to redeem it, but never compellable to do so; any agreement for inducing such compulsion in favour of the creditor was void; and it forms a part of the discussion at present alluded to, whether such an agreement could be made with the surety, as it might enable creditors fraudulently to obtain a power of compelling redemption, by requiring to have a surety in his own interest, with such an engagement in his favour. The reply given to this objection is, that fraud is not to be presumed; and although the allowance of such an agreement may sometimes give an opportunity for the kind of fraud above mentioned,

tioned, which is an inconvenience, yet if, under the pretext of this inconvenience, such an agreement, which is lawful in itself, was prohibited, there would result a still greater, which is, that persons frequently would not find money of which they have need for their business, for want of finding sureties, who would contract an obligation, the duration of which was not limited. Perhaps if all the consequences of this argument were attended to, it would be found that the most general effect of a restriction respecting the compensation to be made for the use of money, is the prevention of accommodation which is mutually beneficial. By the *Roman* law, a surety could only recover a contribution from his co-sureties, in case he obtained a subrogation from the creditor, at the time of payment; but the contrary and evidently the more just and reasonable principle prevailed in *France*.

The other accessory obligations which are the subject of discussion are, 1st. Those of persons directing the loan of money at their risque to others, who are called *managers pecunie credenda*. This subject includes the two propositions which have been introduced, with such elaborate reasoning, into the *English* law, by the recent cases of *Pasley and Freeman*, and *Haycraft and Creasy*. 2. The obligation of employers for the acts of their managers, such as factors, and masters of ships, which differ from the obligations contracted through the medium of agents, on behalf of their principals, and to which the principals only are liable, whereas in the case in question, there is also a liability in the managers. 3d. *Pacta conficta pecunie*; by which a person, by making a promise for the payment of an existing debt, contracted a new obligation without extinguishing the former, which I conceive may be regarded as the real character of our action of *indebitatus assumpsit*, before the extension of it in *Slade's* case, to cases in which there was no other promise than the original contract, and which is also exemplified at present, by giving a promissory note which remains in the hands of the creditor, and by the usual count upon an account stated.

I conceive that the second part of the treatise may be considered upon the whole, as of a more local and technical nature than any of the others, although it certainly includes several discussions of very general importance and utility.

The third part relates to the different manner in which obligations are discharged, and the different bars and prescriptions against them, and begins with a chapter on real payment and configuration. The term payment, which with us is usually confined to a sum of money, is applied generally to any other mode of performing an agreement. The different requisites to a valid payment and satisfaction are very fully examined, and rules are given for the

the application of payment, which in a great measure accord with our own decisions upon the subject; consignation is equivalent in its general effects to a tender of payment, but it was made under a judicial process, and the money was actually deposited which is denoted by the term *consigned*, for the use of the creditor with a person appointed by the judge for the purpose.

The subject of the second chapter, is Novation, or the substitution of one engagement, as the satisfaction of another; it might take place either between the same parties or with the intervention of a new debtor, or creditor, or both; in which latter case it was more specially distinguished by the term delegation.

The third chapter relates to the release of debts, and includes a very curious discussion of the question, whether a creditor may lawfully receive a compensation for discharging a surety, without applying it to the reduction of the debt, which is answered in the affirmative, as the undertaking personally the surety before incumbent on the surety, is a valuable subject of remuneration, and the principal who has to pay more than his own debt cannot have any ground for complaining of such an arrangement. The fourth chapter relates to compensation, or the right which by modern statutes has been introduced into the law of *England*, by the name of set-off, and contains several points in accordance with it, and illustrative of the general principles applicable to each. The fifth chapter relates to extinction by confusion, or the same person becoming entirely and absolutely entitled to the right and subject to the obligation. The sixth, to extinction of the obligation by the extinguishment of the thing due; and the seventh to several other ways in which obligations are extinguished, viz. The lapse of time, the occurrence of a condition, upon which it was agreed that the obligation should determine, and which is called a resolutory condition, and the death of the creditor, or debtor, when the contract or other obligation was of a personal nature. The eighth and last chapter, relates to *fins de non recevoir*, and prescriptions. *Fins de non recevoir*, are bars or estoppels to the maintenance of a claim or defence, such as a judgment, the effect of which will be mentioned, in speaking of the fourth part of the work, or the lapse of time within which it was necessary that the action should be instituted, and which was called prescription, answering to our statutes of limitation, and very analogous to them in its nature and effects.

The fourth part relates to the proof, as well of obligations as of their performance, and is a general view of the law of evidence. The first chapter relates to written evidence, and begins with authentic acts or instruments in writing passed before notaries, and carrying

carrying full credit against the parties, and all claiming under them, of what the act professes to import ; these acts might be impeached as false by a special process instituted for the purpose, but did not require any verification, in which respect they differ from acts under private signature. The evidence of private writings, and tradesmen's books is also examined. There is an article respecting copies, which principally relates to copies made by notaries in the presence of the parties, or after a judicial summons. The second chapter relates to verbal evidence ; the law of *France*, like that of *England*, would not allow verbal evidence to be given in contradiction or explanation of the contents of writings, but it went much further, as no verbal evidence could be given in matters of contract exceeding the value of one hundred livres ; and this exclusion was not confined to the fact of making a contract, but extended to the delivery of goods and the payment of debts. A person who had even deposited any articles in the custody of a friend, could not recover them again by the strongest testimony without having a written acknowledgment. In most cases, whether founded on contract or otherwise, no verbal evidence could be received without a previous judgment for the purpose. When such examination was allowed, it was taken and reported in writing. The examinations were distinguished by the name of the inquests of the respective parties. Two witnesses, except in a very few trifling cases, were necessary to prove the matter in dispute ; the objections to the competence of witnesses, both on the ground of infamy and of motives for partiality, on account of relation or enmity to the parties in dispute, were much more numerous and extensive than with us.

The third and only remaining chapter is concerning confession, presumption, and certain oaths of the *pross*. Presumptions are divided into three kinds ; presumptions *juris et de jure*, which are such as do not admit of any contradiction, such as the authority of a judgment, the decisory oath ; *presumptions* *juris*, which are open to contradiction ; and established by legal authority which are mere inferences. The authority of common presumption is very minutely and satisfactorily examined, including several principles of very general application.

The same section includes also a view of the law respecting a civil *requête*, which was an extraordinary remedy for obtaining relief against any judgment improperly obtained, and has some resemblance to our ancient writ of *audita querela*, and also to the authority of the court of Chancery, in granting injunctions against judgments obtained at law. The decisory oath, was an oath that either party might tender or defer to the other, as to the existence

or

or satisfaction of the demand; the party to whom it was deferred might decline taking it upon referring it back to the first. The oath that was hereupon taken was decisive of the matter in contest, which could not be revived by any evidence of its falsehood, provided it was regularly deferred. The same proceeding obtains in *Scotland* under the term of the oath of verity. There is no occasion for such an institution in *England*, as either party can, by suit in equity, compel a discovery by the oath of the other without being bound to abide by it. The oath upon facts and articles was similar to an oath made by a defendant in answer to a bill of discovery; but I conceive could not be demanded *de jure*, as otherwise the decisory oath would never have been resorted to. The suppletory oath was administered by a judge to either of the parties for his own satisfaction, in consequence of his not forming a completely decisive opinion upon the evidence; and the oath called *juramentum ad litem*, was administered for the purpose of ascertaining the amount of the damage that had been sustained. A very great proportion of these third and fourth parts answers the description of Sir *William Jones*, of being equally good law at *Westminster* as at *Orleans*.

In the translation of this important work, I have endeavoured to convey to my readers a correct and faithful representation of the original, with what success it is not for myself to determine. The work does not aspire to elegance of diction; I have endeavoured to avoid an idiomatical turn of expression, and a redundancy of phrase, by the adoption of relative pronouns, but upon revising it, in which I find more numerous instances than I could have wished, in which the phraseology ^{liberty} has not been sufficiently applied, and in which the phraseology ^{not} be accordant to the *English* reader. For the purpose of increasing the utility of the work, I have substituted a running title expressing the contents of the particular division, for one applicable to the whole treatise; which I only mention as affording me an opportunity of expressing a wish, that a plan, which is very much calculated to assist in the reference to any publication, was more universally adopted. I also in most instances subjoined by way of note the passages of the *Roman* law which are referred to in the course of the work. In countries where that law is at the elbow of every person interested in the subject this would be unnecessary; but as the possession of it in this country is not very general, I conceived that such an addition would in some degree enhance the utility of my undertaking. There are some cases of accidental omission, and others in which the insertion has not been made on account of some error in the reference,

ence, or on account of the passage being of disproportionate length, without affording any additional illustration.

To various parts of the treatise I have likewise added notes, when the relation to the law of *England* appeared to render it desirable; and in the second volume have engaged with the same view in more extensive dissertations. Many parts of the number relating to the law of evidence were composed previous to the appearance of the valuable publication on that subject by Mr. *Peake*; but the objects of the two essays are sufficiently distinct to prevent their interference, the one being principally designed for the purpose of immediate practical reference, and the other endeavouring to assist the investigations of those who were desirous of taking a scientific view of the subject, suggesting to the consideration of the reader several observations, which could not in the practical exercise of the law be offered as authorities to the judgment of the court, in which I have frequently availed myself of the assistance to be derived from the labours of the gentleman just alluded to. In case any of my readers should look upon this part of the work as not entirely destitute of practical utility, it is printed in a manner which may allow of its being bound separately from the rest of the volume.

In the investigation of the subjects which have fallen under my attention, I have assumed the same liberty of observation which I have ventured to recommend to others; wishing to preserve a proper deference and respect to the dictates of judicial authority; but at the same time to maintain according to my ability the equally proper freedom of rational inquiry, and to subject to the test of fair examination the particular opinions, which appeared to be at variance with the correct principles of legal reasoning, and the real purposes of juridical improvement: by no means a friend to wanton innovation, but averse to the name of innovation being placed as an obstacle to every change, which, considered with a due regard to all its consequences and effects, may be really conducive to utility,—I have not been desirous of going out of my way for the purpose of meeting with objections; but when they have occurred in my progress, I have not been disposed to avoid the discussion of them. To offer any caution against placing a greater reliance upon my individual sentiments, than appears due to the reasoning by which they are accompanied, or against acting in practice upon the speculative opinions of an individual, rather than upon the precedents invested with the sanction of authority, would be not only unnecessary but ludicrous. I am not aware that I have any favourite doctrines or theories to support, except the two propositions, that the decisions which result from the principles of substan-

tial justice shall not be sacrificed to the subtilties of artificial reasoning, where the opposite course can be pursued without an improper contravention of legal authority, and that courts of justice should not consider themselves restricted from the correction of erroneous precedents, where the benefit of the correction would be general, and the detriment confined to the parties who in the particular case had been misled by the preceding determination. But while I exercise the liberty which I contend for, with respect to the opinions of others, it would be highly censurable to entertain a presumptuous confidence in my own. I flatter myself that I have at all times been sufficiently guarded, to prevent the mistake of what is only offered as my own suggestions being considered as an actual representation of the existing rules of legal authority.

Several years have elapsed, since I first communicated the intention of offering this work, with some other treatises, to the public ; according to the course which I had then taken, my plan was to offer a treatise referable to the English law, with the assistance of the treatise of *Pothier* as a guide ; after various circumstances had occurred to suspend the execution of this intention, I was induced to change my purpose, and commence my work anew by an entire translation, with the addition of such dissertations as might advance the beneficial purpose of communicating to the English lawyer one of the most esteemed juridical productions of another country.

Some adjudications having taken place in opposition to the opinions that had been expressed in my former publications, with respect to the effect of errors of law ; it afforded me some satisfaction to meet with a treatise, the conclusions of which accorded with my own ideas, by the chancellor *D'Aguesseau*, I was induced to renew my consideration of the subjects with more particularity, and to prepare my view of the result for the inspection of the public, induced, I hope, rather by my sense of the high importance of the subject, than by any overweening attachment to the sentiment which had occurred to myself. This examination and the treatise just referred to were originally intended as the subject of a detached publication ; but a passage in the *Treatise on Obligations* has afforded me an opportunity of giving it an apposite introduction in the present volume. I have there enlarged with some particularity upon that liberty of discussion, respecting which it would perhaps be thought that I have said more than sufficient in the present Introduction, and in different parts of the publication ; but I have preferred incurring in this respect the charge of prolixity and repetitions, to presenting in a mutilated state what had occurred to me as forming an important part of a connected object.

In case I should resume the intention of perfecting a view of the law respecting several particular contracts, it will be done in conformity to my original plan and the specimen formerly exhibited. An entire translation of the treatises of *Pothier*, with an addition by way of note of the decisions of the English law, would in its nature be a work of greater utility, but would in all probability be regarded as too expensive. My preparations were in very considerable forwardness when I announced them to the public, but the present work, in addition to other pursuits and avocations, has almost withheld them from my contemplation, and I am only now about to feel myself at liberty to direct my attention to the reconsideration of the subject.

I have made some allusions to, and extracted some passages from, my former essay, respecting the decisions of Lord *Mansfield*; a work which I undertook with the idea that such an undertaking, proceeding according to the arrangement of *Blackstone's Commentaries*, and conducted with the freedom already so often adverted to, accompanied by a high admiration of the exalted character before me, might have been deemed conducive to its professed object of facilitating the passage from the elementary to the more technical study of the law. That my disappointment has verified the predictions of those who pronounced, that the subject which had to myself appeared so intimately connected with the useful culture of the profession, would not be deemed of sufficient interest to attract attention, (independently of all considerations respecting the execution,) and that the work has remained three years almost entirely unnoticed, are subjects which I have perhaps no right to obtrude upon the public, as the speculation was my own concern, and the success or failure of it is a matter of importance only to myself; but as the same views which have actuated me, in the composition of the present volume, were equally prevalent in that, I cannot but feel some anxiety for escaping a similar mortification.

I am prepared to offer an extensive selection from the pleadings of *D'Aguesseau*, which may be regarded as masterpieces of judicial eloquence, upon subjects of very great importance and very general interest, to the attention of the public, and should feel considerable pleasure in communicating to my readers a part of that gratification which I have myself experienced in the translation; but although I can justly disclaim an excessive regard for pecuniary considerations, I must not allow my attachment to the promotion of a favourite science entirely to supersede the ordinary claims of prudence and discretion.

After the greater part of the present work was printed I formed the resolution of subjoining to it two specimens of the productions which I have just referred to ; the one, an entire pleading upon a subject in which the *English* law would clearly have acted upon similar principles ; the other, an abridgment of a piece, the excellence of which has justly attached to it a peculiar celebrity ; and from which I had previously inserted some extracts referable to the topics of my own discussion. The translation of these additions is preceded by a summary exposition of their contents.

The names of *Pothier* and *D'Aguesseau* are sufficiently connected to render such an addition admissible, for the importance of the objects which both are so admirably calculated to promote ; and even those who may dispute the propriety of the introduction, will perhaps excuse it on becoming acquainted with the company.

With respect to the mechanical execution of the present work, considerable pains and expence have been applied to obviate the defects which have occurred in my former productions, and the consequence of residing at a distance from the press. I am sorry to add that these pains do not, upon revision, appear to have been entirely successful, but I hope that most of the errors which have hitherto escaped observation will be sufficiently corrected by the context.

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(a) (b) (c) There is an omission in the body of the work of referring from these titles to No. XVI, § 13, 14, 15, of the Appendix.

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A
TREATISE
ON THE
LAW
OF
OBLIGATIONS,
OR
CONTRACTS,
&c. &c.

A

T R E A T I S E

O N

O B L I G A T I O N S.

[The figures refer to the numbers in Pothier.]

P R E L I M I N A R Y A R T I C L E.

[1] **T**HE term OBLIGATION has two significations : in its more extensive signification, it is synonymous to *Duty*, and comprises imperfect, as well as perfect Obligations.

Those Obligations are called imperfect, for which we are accountable to God only ; and of which no person has a right to require the performance. Such are the duties of charity and gratitude. The giving of alms, for instance, from our superfluities, is a real Obligation, and the neglect of it is a high offence ; but it is an imperfect Obligation, as we are accountable for it to God only : when the Obligation is discharged, the person who is the object of it receives the alms, not as a debt, but as a benefit. It is the same with the duty of gratitude ; he who has received a signal benefit is obliged to render his benefactor all the services in his power, when occasion offers for his doing so ; and it is sinful and dishonourable to neglect it : but the benefactor has no right to claim such services ; and, when they are rendered, he receives them in his turn as a benefit. If my benefactor had a right to demand that I should render him upon the like occasion the same service which he has rendered me, the assistance I receive would be no longer a benefit but a bargain ; and the service which I render in return would no longer be entitled to the name of gratitude, *the essence of which* consists in its being voluntary.

The term *Obligation*, in a more proper and confined sense, comprises only perfect obligations, which are also called personal engagements, and which give the person, with whom they are contracted, a right to demand their performance ; and it is this kind of Obligation which is the object of the present treatise.

Jurists define these Obligations or personal engagements to be a legal tie which binds us to another, either to give him some thing, or to do or abstain from doing some act, *Vinculum juris quo necessitate adstringimur alicujus rei solvendæ ; Instit. tit. De Obl. Obligationum substantia consistit ut alium nobis obstringat, ad dandum aliquid, vel faciendum, vel præstandum ; L. 3. ff. De Obl.*

The term *legal tie, vinculum juris*, is only applicable to civil Obligations. Natural Obligation, which is only a tie of moral equity, is also, though in a less appropriate sense, a perfect Obligation; for it gives a right, though not in point of law, in point of conscience (a), to the person in whose favour they are contracted, to demand their performance, which imperfect Obligations do not. *Vi. infra, No. 197.*

The present treatise on Obligations will be divided into four parts. In the first we shall examine what relates to the essence of Obligations, and what are their effects.

In the second, the several divisions and kinds of Obligations.

In the third, the several manners in which Obligations are extinguished or defeated.

We shall add a fourth part, respecting the proof as well of Obligations as of their discharge or payment.

P A R T I.

Of the Essence of Obligations and their Effects.

C H A P. I.

Of the Essence of Obligations.

[2] IT is of the essence of Obligations that there should be, 1. A cause from which the Obligation proceeds. 2. Persons between whom it is contracted. 3. Something which is the object of it.

(a) *Si non dans le for extérieur au moins dans le for de la conscience*, these terms *for extérieur* and *for de conscience* continually occur in the writings of *Pothier* ; and it is the professed object of the present treatise to consider the obligations of conscience, as well as those capable of being enforced by law ; but as the former expression does not accord with the idiom of the English language, though the Latin phrase for the latter is naturalized by our juridical writers, I prefer avoiding the metaphorical expression.

The causes of Obligations are, 1. Contracts.—2. Engagements in the nature of contracts [*quasi-contracts*].—3. Injuries [*delicts*].—4. Acts in the nature of injuries [*quasi-delicts*].—Sometimes the mere authority of the law, or the mere force of natural equity.

We shall treat; 1. Of Contracts, which are the most frequent source of Obligations.

2. Of the other causes of Obligations.
3. Of the persons between whom they are contracted.
4. Of the things which may be the object of them.

SECTION I.

Of Contracts.

We shall examine; 1. What a contract is, and wherein it differs from a pollicitation; and what things are principally to be distinguished in each kind of contract. 2. We shall state the several divisions of contracts. 3. We shall treat of the general defects or vices which may occur in contracts. 4. Of the persons who can or cannot contract. 5. Of what may be the object of contracts; and herein of the rule of the civil law, that it can only be something which concerns the interests of the contracting parties, and that a person can only stipulate or promise for himself. 6. Of the effect of contracts. 7. We shall state the rules for the interpretation of contracts. 8. We shall speak of the oath sometimes taken for the performance of agreements.

ARTICLE I.

What a Contract is, wherein it differs from a Pollicitation, (or Promise,) and what Things are principally to be distinguished in every Contract.

§ I. *What a Contract is.*

[3] A contract is a particular kind of agreement; to understand the nature of a contract, we should therefore previously understand the nature of an agreement.

An agreement is the consent of two or more persons to form some engagement, or to rescind or modify an engagement already made. *Duorum vel plurium in idem placitum consensus, L. 1. § 1. ff. De Pact.*

That kind of agreement, the object of which is the formation of an engagement, is called a contract. The principles of the *Roman* laws respecting the different kinds of agreements, and the distinction between contracts and simple agreements, not being founded

on the law of nature, and being indeed very remote from simplicity, are not admitted into our law.

Hence it follows, that in our law we should not define a contract as it was defined by the interpreters of the *Roman* law; *conventio nomen habens a jure civili vel causam*; but that it should be defined, 'An agreement by which two parties reciprocally promise and engage, or one of them singly, promises and engages to the other to give some particular thing, or to do or abstain from doing some particular act.'

The words *promise and engage* are used because those promises alone which are made with the intention of producing an engagement, and of giving the party to whom they are made a right of demanding their performance, can amount to a contract and agreement.

There are other promises made with fairness and a real design of accomplishing them, but without any intention of giving the person to whom they are made a right of demanding their performance. This is the case where a person makes a promise, intimating, at the same time that he does not mean to engage himself; or when such a reservation can be implied from the circumstances of the case, or the relative characters of the person making the promise, and the person to whom it is made. As if a father promises his son at college, that if he is attentive to his studies there, he will give him money for a journey of pleasure in the vacation; it is evident that, in making this promise, the father does not mean to contract what can properly be called an engagement. These promises produce, indeed, an imperfect obligation for their performance, if nothing unforeseen occurs which would have prevented their being made. But still they do not constitute any engagement, nor consequently any contract.

§ II. *Wherein a Contract differs from a Pollicitation.*

[4] It can no longer be a question whether pollicitations are obligatory by the law of *France*; the ordinance of one thousand seven hundred and thirty one, Art 3. having prohibited all gratuitous dispositions of property, except by actual donation in the life time of the donor, or by testament.

The *definition* already given of a contract explains the difference between that and a pollicitation. A contract includes a concurrence of intention in two parties, one of whom promises something to the other, who on his part accepts such promise. A pollicitation is a promise not yet accepted by the person to whom it is made. *Pollicitatio est solius offerentis promissum*, L. 3. ff. *De Pollicit.*

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A pollicitation, according to the rules of mere natural law, does not produce what can be properly called an Obligation ; and the person who has made the promise may retract it at any time before it is accepted ; for there cannot be any obligation without a right being acquired by the person in whose favour it is contracted against the person bound. Now as I cannot, by the mere act of my own mind, transfer to another a right in my goods, without a concurrent intention on his part to accept them, neither can I by my promise confer a right against my person, until the person to whom the promise is made has, by his acceptance of it, concurred in the intention of acquiring such right. *Grotius*, lib. 2. c. 2.

But though a pollicitation is not obligatory by the mere force of natural law, the civil law, which comes in aid of the natural law, according to the *Roman* system of jurisprudence, rendered the pollicitations of a citizen to the place to which he belonged obligatory in two cases. 1. When there was a just cause for making it ; as in consideration of holding some magistracy within the place, *ob honorem*. 2. When it had been begun to be carried into execution. *L. 1. ff. De Poll.*

§ III. *Of three Things, which are to be distinguished in every Contract.*

[5] With respect to contracts, *Cujas* makes no other distinctions than of those things which are of the essence of the contract and those which are accidental to it. The distinction made by many lawyers of the seventeenth century is much more accurate ; they distinguish three different things in each contract — Things which are of the essence of the contract, things which are only of the nature of the contract, and things which are merely accidental to it.

[6] 1st. Things which are of the essence of a contract are those without which such contract cannot subsist, and for want of which there is either no contract at all, or a contract of a different kind.

For instance, it is of the essence of a contract of sale that there be a thing sold, and a price for which it is sold. Therefore if I sell you a thing which without the knowledge of either of us has ceased to exist, there will be no contract, *L. 57. ff. De Contr. Emp.* it being impossible that there can be a sale without a thing sold. Also if I agree to sell you any thing for the price given for it by my relation from whom it has descended to me, and it appears that it had not been sold but given to him, there will be no contract for want of a price.

In these instances the want of any of the things which are of the essence of the contract prevents a contract of any kind from take

ing place. Sometimes the want of essential circumstances only changes the nature of the contract.

For instance, the essence of a contract of sale being a price which consists in a sum of money to be paid by the buyer to the seller, if there is an agreement that I shall sell you my horse for one of your books, this agreement does not constitute any sale, as there can be no sale without a price in money. But still the agreement is not null; for it forms a different kind of contract, namely, an exchange.

In the same manner it is of the essence of a contract of sale, not indeed that the seller shall precisely oblige himself to transfer to the buyer the property in the thing sold, if he is not the proprietor of it; but that he shall not retain it, if he is the proprietor: thus if it is agreed that I shall sell you an estate for a certain sum, and an annuity which you agree to pay, which estate I undertake that you shall enjoy, but with a reservation that the inheritance of it shall remain with me; this agreement forms not a sale, it being contrary to the essence of a sale that the seller should retain the property; but becomes a lease. 80 ff. *De Contr. Emp. Nemo potest videri rem vendidisse de cujus dominio id agitur, ne ad emptorem transeat; sed hoc aut locatio est, aut aliud genus contractus.*

In like manner it is of the essence of the contracts of loans for use [*pret d'usage, commodatum*], of mandates, and of deposit, that they shall be gratuitous. If I lend you any thing in consideration of your agreeing to pay me a certain sum for the use of it, that is not a contract of lending (*commodatum*), but of a different kind, viz. of hiring (*locatio, conductio*). For the same reason, if when I accept a commission from you, or a thing which you entrust to my care, I require a recompence, there is not any mandate or deposit, but a contract of hiring, in which I let out my trouble in transacting your business or taking care of your property.

[7] 2d. Things which are only of the nature of the contract are those which, without being of the essence, form a part of it, though not expressly mentioned; it being of the nature of the contract that they shall be included and understood.

These things have an intermediate place between those which are of the essence of the contract, and those which are merely accidental to it, and differ from both of them.

They differ from those which are of the essence of the contract, inasmuch as the contract may subsist without them, and they may be excluded by the express agreement of the parties; and they differ from things which are merely accidental to it, inasmuch as they form a part of it without being particularly expressed, as may be illustrated by the following examples. In the contract of sale the

the obligation of warranty (a), which the seller contracts with the purchaser, is of the nature of the contract of sale; therefore the seller, by the act of sale, contracts this obligation, though the parties do not express it, and there is not a word respecting it in the contract; but as the obligation is of the nature and not of the essence of the contract of sale, the contract of sale may subsist without it; and if it is agreed that the seller shall not be bound to warranty, such agreement will be valid, and the contract will continue a real contract of sale.

It is also of the nature of the contract of sale, that as soon as the contract is completed by the consent of the parties, although before delivery, the thing sold is at the risk of the purchaser; and that if it happens to perish without the fault of the seller, the loss falls upon the purchaser, who is, notwithstanding the misfortune, liable for the price; but as that is only of the nature and not of the essence of the contract, the contrary may be agreed upon.

Where a thing is lent to be specifically returned [*commodatur*], it is of the nature of the contract that the borrower shall be answerable for the slightest negligence in respect of the article lent. He contracts this obligation to the lender by the very nature of the contract, and without any thing being said about it: but as this obligation is of the nature, and not of the essence of the contract, it may be excluded by an express agreement that the borrower shall only be bound to act with fidelity, and shall not be responsible for any accidents merely occasioned by his negligence.

It is also of the nature of this contract that the loss of the thing lent, when it arises from inevitable accident, falls upon the lender; but as that is of the nature and not of the essence of the contract, there may be an agreement to charge the borrower with every loss that may happen until the thing is restored.

A great variety of other instances might be adduced from the different kinds of contracts.

[8] 3d. Those things which are accidental to a contract are such as, not being of the nature of the contract, are only included in it by express agreement. For instance, the allowance of a certain time for paying the money due; the liberty of paying it by instalments, that of paying another thing instead of it, of paying to some other person than the creditor, and the like, are accidental to the contract, because they are not included in it without being particularly expressed (b).

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(a) It is immaterial here to consider how far the illustration would accord with the decisions of the *English* law. The law may be assumed for the present purpose to be as stated.

(b) These several distinctions may be further illustrated from the *English* law by the case of a lease. It is essential to a lease that there shall be a reversion in the lessor—This in-

ARTICLE II.

Division of Contracts.

[9] The division of contracts by the *Roman* law into nominate and innominate; contracts *bonæ fidei*, and contracts *stricti juris*; is not adopted in the law of *France*. The divisions recognized in *France*, are, 1. into reciprocal [*synallagmatiques*] and unilateral contracts.

Reciprocal contracts are those in which each of the parties enters into an engagement with the other, such as sale, hire, &c.

Unilateral contracts are those in which one of the parties contracts an engagement to the other, as the loan of money [*pret d'usage, mutuum*].

Reciprocal contracts are subdivided into perfect and imperfect. In those that are perfectly reciprocal, the obligation of each of the parties is equally a principal obligation of the contract; such as sale, hiring, partnership, &c. For instance, in the contract of sale, the obligation of the seller to deliver the article sold, and of the purchaser to pay the price, are equally principal parts of the contract. The contracts which are imperfectly reciprocal are those in which the obligation of one of the parties only is a principal obligation of the contract; such are the contracts of mandate, deposit, loans for use, and pledge. In these the obligation of the mandatary to give an account of his commission, and of the party receiving a thing by way of deposit, loan, or pledge, to restore it, are principal obligations of the contracts; those of the employer, the lender, or

duces several consequences, as a right of action founded upon privity of estate, a power to distrain, &c. If the person who makes a contract in the form of a lease does not retain a reversion, the essential character of that contract does not exist, and the incidental consequences do not attach; but still there is a valid contract of a different kind. It is of the nature of a lease for lives or years that it shall be impeachable for waste; but the contrary is every day specially provided for. A covenant that the tenant shall use a particular course of husbandry is accidental.

The following case, depending in a material degree on the distinction between things of the nature of, and those accidental to a contract, occurred respecting a contract of apprenticeship.

The stat. 8 *Ann. c. 9.* provides, That when any thing shall be contracted for the use or benefit of the master, a certain duty shall be paid, or the contract shall be void. It was long a disputed question, whether an agreement by the father of the apprentice to find his son with board and lodging was included in this provision, and many cases had been decided upon collateral grounds without meeting the general question; but when that question came for a direct decision, it was holden that no duty was payable. Lord *Keynes*, in the course of his opinion, said, that it had occurred to him early in the argument, that in order to see what would or would not be considered as a benefit to the master, it was necessary to inquire what were the duties resulting from the bare relation of master and apprentice; and upon examining that question, he held that the duty of the master did not extend to finding sustenance for the apprentice. *The King v. Leighton*, 4 *T. R.* 732.

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the person making the deposit or pledge, are only incidental obligations, on account of some expence incurred subsequent to the contract in the execution of the commission, or keeping the thing deposited, lent, or pledged (a).

[10] 2. Contracts are divided into those, which are formed by the mere consent of the parties, and therefore called consensual, such as sale, hiring, mandate ; and those in which it is necessary that there should be something more than mere consent, such as the loan of money, deposit, or pledge, which from their nature, require a delivery of the thing (*rei*) ; whence these contracts are called real.

[11] Although the mere consent of the parties is sufficient for the perfection of consensual contracts, nevertheless if, in agreeing upon a sale or any other bargain, they also agree that there shall be a formal act passed before a notary, with the intent that the bargain shall not be deemed perfect and conclusive until that is done, the contract is not perfect until the notarial act is so likewise ; and the parties, though they have agreed upon the terms, may recede before the act is complete.

But if in this case the act is requisite for the perfection of the contract, this is not the nature of the contract itself, which requires nothing more for its completion than the consent of the parties ; it is only because the parties have so agreed, and it was competent for them to make their obligation depend upon what conditions they pleased.

It must be observed that an agreement, that the act shall be executed before a notary, does not of itself make the perfection of the agreement depend upon that being done. In order to induce that consequence, it must appear that such was the intention of the parties. Therefore it was decided that a person could not avoid a contract of sale made under the private signature of the parties, though there was a clause that the act should be executed before a notary, and such act had not taken place ; because it was not to be concluded from that clause alone, that the parties intended that the perfection of their agreement should depend upon the execution of it before a notary. The clause might only have been added for the purpose of more effectually securing the execution of the agreement, by the additional legal advantages attached to such a mode of authentication, and the danger of private writings being lost.

(a) These distinctions were more important in the *Roman law*, on account of the *actio directa* adapted to the principal obligation, and the *actio contraria* to the incidental, to which the *English law* has nothing analogous.

But when the agreement is verbal, it is more easy for the party called upon to execute it, to insist that the matter rested only in project, until the proposed signature before the notary was complete ; because, as agreements, the consideration whereof exceeds the value of 100 livres, cannot, according to the law of *France*, be proved by witnesses, and consequently there being no other proof of the agreement than the verbal declaration, the whole ought to be construed together.

Where there is an instrument under private signatures, which has not received its entire perfection by the signature of all the parties, some of them having withdrawn without signing, those who have signed may recede, and are allowed to allege that, on entering into the agreement, they intended it should depend upon the entire completion of the instrument. Upon this principle the sale of an office made by a widow, as well in her own name as in the character of guardian to her son, who was a minor, was declared imperfect, and the person who had agreed for the purchase was discharged, because the instrument had not received its completion by the signature of the curator of the minor, who was named in it, as assenting on behalf of the minor, though that was unnecessary.

[12] The third division of contracts is into contracts of mutual interest, contracts of beneficence, and mixed contracts.

The first are those, which are entered into for the reciprocal interest and utility of each of the parties, such as sales, exchange, hiring, partnership, and an infinity of others.

Contracts of beneficence are those, by which only one of the contracting parties is benefited, such as loans, deposit, and mandate.

Contracts by which one of the parties confers a benefit on the other, receiving something of inferior value in return, are mixed, such as a donation subject to a charge.

[13] Contracts of mutual interest are divided into commutative and aleatory ; commutative are those in which each of the contracting parties receives an equivalent for what he gives, as in the contract of sale, the seller ought to give the thing sold, and receive a price, which is the equivalent ; the buyer ought to give the price, and receive the thing sold, which is the equivalent. These contracts are divided into four classes, *viz. Do ut des, facio ut facias, facio ut des, do ut facias.*

Aleatory (or hazardous) contracts are those by which one of the contracting parties, without contributing any thing on his part, receives

receives something from the other, not by way of gift, but as a compensation for the risk which he runs. All games of chance, wagers, and contracts of insurance, are contracts of this description.

[14] A fourth division is into principal and accessory contracts.—The first are those which take place principally and on their own account, the second those which are entered into for assuring the performance of another contract, such as pledging and the engagements of sureties.

[15] A fifth division of contracts is into those which are subjected by the civil law to certain rules or forms, and those which are regulated by mere natural justice.

Those which in *France* are subjected to certain rules or forms are marriage (a), donation, bills of exchange, and annuities. No other agreements are subjected to any forms or arbitrary rules prescribed by the civil law: and provided they contain nothing contrary to law or morality, and take place between persons able to contract, they are obligatory, and induce a right of action. If the laws ordain that those contracts, the consideration in which exceeds the sum of 100 livres, shall be reduced into writing, they have nothing more in view than to regulate the manner in which they shall be proved, in case the parties dispute the fact of their having taken place; but it is not intended that the writing shall be considered as the substance of the agreement, which is valid without; and if the parties do not deny it to have been made, they may be compelled to execute it, and the decisory oath may even commonly be tendered to those who dispute it; the writing is only necessary for the proof and not for the substance of the agreement (b).

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(a) The relation of marriage is in *England* considered as a subject of so much higher a nature than ordinary contracts, that it is very seldom referred to as having any analogy with them. Annuities and bills of exchange are with us subject to special rules, as are some other particular contracts; for instance, the transfer of ships. The *French* law respecting the necessity that contracts of a certain value should be in writing, bears a very considerable analogy to our statute of frauds, as will appear when the provisions of that statute are particularly referred to.

(b) This passage was referred to in the argument of counsel in the case of *Coorb v. Jackson*, 6 Ves, 23. The question was, Whether a party admitting a parol agreement in answer to a bill in equity, but praying the benefit of the statute of frauds, lost the benefit of the statute? which Lord *Eldon*, who decided the case on another ground, thought that he did not. The passage referred to is in the argument for the plaintiff in support of the opposite proposition, and is as follows: “A very high authority, *Pothier* in his treatise upon obligations puts this case: By the *French* law an agreement was not binding for any sum exceeding 100 livres, unless it was in writing; *Pothier* says this does not apply where the party admits the agreement; and the other party has a right to make him give his oath whether

ARTICLE III.

Of the different Defects which may occur in Contracts.

[16] The defects which may occur in contracts are, error, force, fraud, inequality, want of consideration, and want of obligation. These will each be considered separately.

The defects which result from the inability of some of the contracting parties, or from a defect in the object of the contract, will be considered in the succeeding articles.

§ I. *Error.*

[17] Error is the greatest defect that can occur in a contract, for agreements can only be formed by the consent of the parties, and there can be no consent when the parties are in an error respecting the object of their agreement. *Non videntur qui errant consentire, L. 116. § 2. ff. De Reg. Jur. 57. De Oblig. et Act.*

Therefore if a person intends to sell me any thing, and I intend to receive it by way of loan or gift, there is neither sale, nor loan, nor gift. If a person intends to sell me one thing, and I intend to buy or receive a donation of another, there is neither sale nor donation. If he intends to sell me a thing for a certain price, and I intend to buy for a less price, there is no sale, for in all these cases there is no consent. *Sive in ipsa emptione dissensionem, sive in pretio, sive in quo alio, emptio imperfecta est. Si ego me fundum emere Cornelianum, tu mihi te vendere Sempronianum putasti, quia in corpore dissensimus emptio nulla est. L. 9 ff. De Contr. Emp.*

[18] Error annuls the agreement, not only when it affects the identity of the subject, but also when it affects that quality of the subject which the parties have principally in contemplation, and which makes the substance of it. Therefore if, with the intention of buying from you a pair of silver candlesticks, I buy a pair which are only plated, though you have no intention of deceiving me, being in equal error yourself, the agreement will be void, because my error destroys my consent; for my intention was to buy a pair of silver candlesticks. Those which you offer to

whether he did enter into such agreement, this being a law of evidence.—It is proper that the nature of the *serment decisoire*, which is here referred to, should be particularly understood. It is an oath tendered by one party to the other, upon which a denial of the person taking the oath is absolutely conclusive, and the fact cannot afterwards be controverted; a proceeding which has but a partial analogy to our answers in chancery, as those in general are not conclusive; although Lord *Eldon's* opinion in the case alluded to imports the contrary in respect to this particular subject, as to the nature of the *serment decisoire*: see *Part 4. c. 3. Sec. 3 Art. 1.*

sale

sale being plated, it cannot be said that they are what I intended to buy. This is decided by *Julian* in a similar case, l. 41. § 1. ff. d. t. and *Ulpian*, l. 14., where he says, *Si as pro auro veneat non valet*.

It is otherwise if the error only affects some accidental quality of the thing. For instance, if I buy a book on the supposition that it is a work of excellence, when in fact it is below mediocrity; this error does not destroy my consent, nor consequently vitiate the contract. What I intended to buy and had in view was in truth the book actually sold to me, and not any other thing. My error respecting the goodness of the book only applies to the motive in purchasing it, and does not interfere with its being the very book which I intended to buy. Now it will be seen presently that an error in the motive does not destroy the agreement. It is sufficient that the parties have not erred respecting the *object* of the agreement, *et in eam rem consenserint*.

[19] Here the question arises, Whether an error respecting the person with whom I contract annuls the agreement? This should be answered with a distinction: wherever the consideration of the person with whom I contract is an ingredient of the contract which I intend to make, an error respecting the person destroys my consent, and consequently annuls the agreement; for instance, if with the intention of giving or lending a thing to *Peter*, I give or lend it to *Paul*, whom I mistake for *Peter*, the gift or loan is void for want of my consent; for I did not intend either to give or lend the thing to *Paul*, but only to *Peter*; a consideration of the Person of *Peter* was an ingredient in the contract that I intended to make.

So if intending to have a picture taken by a particular artist, I make a bargain for such picture with another person, whom I mistake for that artist, the bargain is void for want of my consent, for I did not intend to have the picture taken by that other. A consideration of the person and reputation of the artist whom I had in view was an ingredient in the bargain which I intended to make.

Nevertheless, if the person actually applied to, and who was ignorant of my mistake, had, in consequence of this erroneous agreement, completed the picture, I should be obliged to take it and pay him a proper compensation. But in this case I am obliged, not by the agreement, which was void, and therefore could not produce any obligation; the reason of my obligation is the principle of equity which obliges me to indemnify the person whom I have imprudently led into an error: and according to the *Roman* law, an action different from that, which would arise upon the

the agreement, was founded upon this obligation, called *actio in factum*.

We have seen that an error respecting the person annuls the agreement, wherever a consideration of the person forms an ingredient in the agreement.

On the contrary, when the consideration of the person with whom I suppose myself to contract, forms no ingredient in the contract, and I should equally have made the contract with any other person, the contract would be valid. For instance, if I buy a book in boards from a bookseller, who engages to deliver it to me bound; although this bookseller, at the time of the sale, supposes me to be *Peter*, to whom I have a resemblance, and even calls me *Peter*, without my undeceiving him, this error on his part respecting the person to whom he makes the sale, does not annul the agreement; and he cannot refuse to deliver the book at the price agreed upon, in case the price has in the mean time advanced; for although he thought he was selling his book to *Peter*, nevertheless, as it was indifferent to him who purchased his goods, and it was not precisely and personally to *Peter* that he wanted to sell the book, but to any body who was willing to give the price of it, it may be truly affirmed of me, that I was the person to whom he intended to sell his book, and to whom he is obliged to deliver it. Such is the opinion of *Barbeyrac* on *Puffendorf*, L. 3. c. 6. n. 7. not. 2.

[20] As to the question, Whether an error in the motive annuls an agreement? *Puffendorf* l. 3. c. 6. n. 7. thinks it does provided I communicate to the person with whom I contract the erroneous motive by which I am influenced; because in this case the parties, according to his opinion, should be considered as intending to make their agreement depend upon that motive as a kind of condition. He adduces by way of example a case, in which, upon receiving a false account of the death of one of my horses, I buy another, communicating at the same time to the seller the intelligence that I have received: and *Puffendorf* thinks that in this case I may rescind the bargain, provided it has not been executed on either side, subject to indemnifying the seller if he has suffered any thing from the non-execution of it.

Barbeyrac points out very properly the inconsistency of this reason; for if it was true that we had made our agreement depend upon the truth of the intelligence, as soon as the intelligence proved false, the agreement would be void, *defectu conditionis*, and the seller consequently could have no claim to damages for the non-execution of it. *Barbeyrac* therefore consistently decides that this error in the motive does not produce any defect in the agreement. And,

as in case of legacies, the circumstance of the motive by which the testator declares himself to be influenced being false, does not prevent the legacy being valid; for it is still true that the testator intended such a legacy, and it must not be concluded from what he has said of the motive that induced him to leave it, that he intended the legacy to depend upon the truth of that motive as a condition, unless such intention is otherwise sufficiently indicated: in the same manner, and for much stronger reasons, it should be decided with respect to agreements, that an error in the motive which induces a party to contract, does not affect the agreement and prevent its being valid; because there is much less reason to presume that the parties intended their agreement to depend upon that motive as upon a condition; conditions ought to be interpreted *prout sonant*, and conditions which can only be interposed by the consent of two parties should be implied with much more difficulty than in case of legacies (a).

§ 2. II. Of Want of Liberty.

[21] The consent by which agreements are formed ought to be free. If the consent of any of the contracting parties is extorted by violence, the contract is vicious, but as a consent, though extorted, is still a consent, *voluntas coacta est voluntas*; it cannot be said, as in case of error, that there is no contract. There is one, although it is vicious, and the person whose consent is extorted, or his heirs, may procure it to be annulled by letters of rescission.

If after the violence is at an end he approves the contract whether expressly, or tacitly by letting the time allowed for restitution, which is ten years, elapse, the vice is purged (b).

[22] When the violence is committed by the person with whom I contract, or by his participation, the agreement is not binding either by the civil law, or even by the law of nature: for supposing that there resulted any obligation from me to you

(a) Some years ago a case occurred respecting an error in the subject of the contract. A painting was sold as an original of *Poussin*, but afterwards it appearing from the opinion of several artists to be the work of some other person, it was held that the sale was void, and the purchaser entitled to reclaim his money.

(b) In *England*, it is not necessary for the person whose consent is obtained by violence to institute any process analogous to the letters of rescission above mentioned; the force may be used as a defence in any suit founded on the contract. But the contract is not absolutely void, the party who has suffered the force, may waive the exception by subsequent assent, and the party imposing the force can never allege it as a defence if the contract is insisted upon by the other side.

in consequence of my consent extorted by violence; the injustice committed by you in exercising that violence, obliges you to indemnify me for the injury which I suffer by it; and that indemnity consists in discharging me from the obligation which you have obliged me to contract. Hence it follows that my obligation, if there be one, cannot be binding by the principles of natural law. This is the reason given by *Grotius de Jur. bell. lib. 2. c. 11. n. 7.*

[23] When the violence is exercised against me by a third person, without the participation of him with whom the contract is made, the civil law does not on that account withhold its assistance from me, it rescinds all obligations contracted by violence, from whomsoever the violence may proceed. This results from the 9th law *Ff. quod met. prator generaliter et in rem loquitur*; but *Grotius* maintains that it is only by the authority of civil law that I in this case obtain the rescission of an obligation which, by the rules of natural law would be binding. According to him the civil law only regards my assent as imperfect on account of the agitation of mind suffered from the violence, nearly in the same manner as it presumes the consent of minors to be imperfect, and allows the rescission of their contracts, *propter infirmitatem judicii*. But according to this author my consent, although given under the agitation which this violence occasions, is still, according the mere law of nature, a real consent sufficient to form an obligation; the same as that of a minor, though he has not that maturity of understanding which belongs to a more advanced age.

Puffendorf and *Barbeyrac* think, on the other hand, that even by the rules of natural law when I am constrained by violence to enter into a contract, the contract is not obligatory upon me, though the other party was not at all concerned in the violence.

The reason adduced by *Barbeyrac* is as follows: It is true, says he, that a consent, though extorted, by violence, is still a consent; *coacta voluntas, voluntas est*; and it is such as affects us with guilt, when we consent, even by constraint, to do what the laws of nature forbid, or to abstain from what they command: thus a christian was guilty of a crime in sacrificing to idols, though constrained by the fear of tortures or death. But though a consent extorted by violence is a real consent; it is not sufficient to induce a valid obligation of giving or doing any thing we may promise; for, as the law of nature has subjected every thing which it does not prohibit to our free and voluntary choice, it is only by such free and voluntary choice that we can contract an obligation of giving or doing any thing in respect to which we are left to our own choice by that law.

The agreement then is not the less defective, although the person with whom I have been forced to make it had no share in the violence imposed upon me. For notwithstanding this, my consent is imperfect; and it is that imperfection in the consent, which the law regards in releasing me from the obligation alleged to result from it. *Neque enim lex adhibenti vim irascitur, sed passo succurrit; et iniquum illi videtur id ratum esse, quod aliquis, non quia voluit pactus est, sed quia coactus est; nihil autem refert per quem illi necesse fuit; iniquum enim quod rescinditur, facit persona ejus qui passus est, non persona facientis.* Senec. Controv. iv. 26.

Puffendorf excepts one case in which an obligation though contracted under the impression of fear, arising from violence, is notwithstanding valid; that is, when I promise something to a person for coming to my assistance and delivering me from the violence which is exercised against me. For instance, if being attacked by robbers, I descry a person to whom I promise a sum of money for delivering me out of their hands. This obligation though contracted under an impression of the fear of death is valid. This is also the decision of the 9th law, *Ff. quod. met. caus. Eleganter Pomponius ait: Si quo magis te de vi hostium vel latronum tuerer, aliquid a te accepero, vel te obligavero, non debero me hoc edicto teneri; ego enim opera potius mea mercedem accepisse videor.*

Nevertheless if the sum which is promised is excessive, my obligation may be reduced to making a just recompence for the service which has been rendered me.

[25] The violence which vitiates a contract for want of liberty ought, according to the principles of the Roman law, to be such as is capable of making an impression upon a person of courage. *Metus non vani hominis, sed qui in homine constantissimo cadat, l. 6. Ff. dict. tit.*

It is necessary that the party who insists upon his having been forced into a contract should have been intimidated by the apprehension of some serious evil, *metu majoris mali, l. 5. Ff. dict. tit.* either in his own person or in that of some of his family, *nam nihil interest in se quis veritus sit, an liberis suis. l. 8. Ff. d. t.*; and it should be an evil which is threatened to take place immediately if the thing is not done which is required, *metum presentem non suspitionem inferendi ejus, l. 9. Ff. d. t.*

Where the menaces, which a person uses in order to make me contract an engagement, are only some vague menaces respecting something to happen in future, by which I am foolishly intimidated; although according to the principles of the Roman law the contract would not be esteemed invalid on account of the want of

liberty of consent; it must not be concluded that such a manoeuvre would be unpunished, and that the contract would subsist. The seventh law of the same title says, very justly, *Si quis meticulosus rem nullam frustra timuerit*; PER HOC EDICTUM *non restituitur*; but it does not say absolutely *non restituitur*. If the contract in this case is not defective for want of what the law deems requisite to freedom of assent; it is defective for want of that good faith which ought to prevail in every contract.

This manoeuvre of the person to whom I have contracted is an injustice which obliges him to the reparation of the wrong, which reparation consists in the rescission of the contract.

If I foolishly suffer myself to be intimidated by a third person, and the person with whom I contract has no concern in it; the contract would be valid, and I should be left to my action *de dolo* against the person who intimidated me.

These principles of the *Roman* law are very just, and are founded on natural equity; except that which does not admit of any other fear being insufficient to invalidate the contract than such as is capable of making an impression upon a man of the greatest courage, is too rigid and not to be literally followed; but upon this subject, regard should be had to the age, sex, and condition of the parties; and a fear which would not be deemed sufficient to have influenced the mind of a man in the prime of life and of military character, nor consequently to rescind his contract, might be judged sufficient in respect of a woman, or a man in the decline of life (a).

[26] The violence which leads to the rescission of a contract, should be an unjust violence, *adversus bonos mores*; and the exercise of a legal right can never be allowed as a violence of this description; therefore a debtor can have no redress against a contract which he enters into with his creditor, upon the mere pretext that he was intimidated by the threats of being arrested, or even of his being actually under arrest, when he made the contract, provided the creditor had a right to arrest him. The 22d law *ff. quod met. caus.* which says *Qui in carcerem quem detrusit, ut aliquid ei extorqueret,*

(a) I cannot but think it would be more reasonable to hold, that if a person actually contracted under the impression of fear induced by the misconduct of another though by means in general inadequate to such an effect, it should be a sufficient ground to vitiate the contract, and that the infirmity of one man's mind should not be taken advantage of for the purpose of conferring a benefit on another, whether that other was or was not implicated in the misconduct, though the age, constitution, and occupation of the party might furnish very material evidence in deciding upon the fact; and such, I think it is probable would be the decision of the *English* law. But the same infirmity of disposition, which would be sufficient to prevent the validity of a contract, might afford an inadequate excuse for the commission of an offence, or the omission of a duty.

quicquid

quicquid ob hanc causam factum est, nullius momenti est, is to be understood of an unjust imprisonment.

[27] The fear of displeasing a father or mother or other person to whom we owe regard, is not such a fear as vitiates a contract made under the impression of it; but if a person who has another under his power uses ill-treatment or menaces to force him to contract, the contract may according to the circumstances, be subject to rescission (a).

§ III. *Of Fraud.*

[28] The term fraud (*dolus*) is applied to every artifice made use of by one person for the purpose of deceiving another. *Labeo definit dolum omnem calliditatem, fallaciam, machinationem ad circumveniendum, fallendum, decipiendum alterum, adhibitam; L. 1. ff. de dol.*

[29] When a party has been induced to contract by the fraud of another, the contract is not absolutely and essentially void, because a consent, though obtained by surprize, is still a consent; but the contract is vicious, and the party surprized may institute a process for its rescission within ten years (b).

[30] As a matter of conscience any deviation from the most exact and scrupulous sincerity is repugnant to the good faith that ought to prevail in contracts. Any dissimulation concerning the object of the contract, and what the opposite party has an interest in knowing, is contrary to that good faith: for, since we are commanded to love our neighbour as ourselves, we are not permitted to conceal from him any thing which we

(a) A detrimental contract obtained by a father from a son, &c. is always in the English courts of equity regarded with very great jealousy; but the undue influence, which is usually exerted in obtaining such contracts, is rather referable to the objection of fraud than of force.

(b) Here the law of England essentially differs from the civil law; by the latter the fraud must have been necessarily made the object of an original suit, whereas by the former it may be shewn as a matter of defence; but the observation, that fraud does not essentially vacate the contract, is true. It is an objection of which the person defrauded may take advantage, but if he assents to the contract, the opposite party cannot found any exception upon shewing a fraud in himself, which if the contract was essentially void might be done. Also the person defrauded, having once dispensed with the objection after he is fully apprized of the fact is (except in particular cases) concluded by his assent, and the contract is equally valid as if no fraud had intervened. For instance, it is considered as a fraud to employ fictitious bidders, or as they are usually called, passers, at an auction. A purchaser may refuse to assent to a sale in which that fraud has taken place; but if he is fully apprized of the circumstance, and afterwards proceeds in the execution of the contract, he cannot resort to the objection of fraud in order to support a subsequent change of inclination.

should be unwilling to have had concealed from ourselves, under similar circumstances.

But in civil tribunals a person cannot be allowed to complain of trifling deviations from good faith in the party with whom he has contracted. Nothing but what is plainly injurious to good faith ought to be there considered as a fraud sufficient to impeach a contract, such as the criminal manœuvres and artifices employed by one party to induce the other to contract. And these should be fully substantiated by proof. *Dolum non nisi perspicuis indicis probari convenit.* L. 6. C. de dol. mal. (a).

[31] It is only the fraud which induces the contract that can furnish ground for the impeachment of it; that is, the fraud by which one party induces another to contract who would not have contracted otherwise. Any other fraud only entitles the party to a reparation in damages for the injury sustained (b).

[32] In order to impeach the contract, it is also necessary that the fraud should be committed by the opposite contracting party, or at least that he should participate in it. If it is committed without his participation, and I have not suffered any very serious injury; my engagement is valid, and I have only a right of action against the person guilty of the fraud for the damages sustained in consequence of it (c).

(a) This rule must not be understood as excluding the inference of fraud from a combination of circumstances, which from the concealment that usually accompanies fraud, is all the evidence that the nature of the case will generally admit.

(b) I conceive that there are many cases in which this proposition would not be adopted by an *English* court, and that even as a general rule a party may except to the performance of a contract affected by fraud, though it might not appear that he would not have entered into the engagement if that fraud had not taken place. In fact, it would be very difficult to ascertain, in particular cases, what degree of influence the fraudulent act might have had upon the mind of the contracting party, and it is therefore preferable to allow it as a sufficient ground of objection, that the fraud had a tendency to produce such influence.

(c) This opinion would also, I conceive, be subject to several qualifications; for if the right of the party, with whom the contract is made, in any degree depends upon an adoption of the facts of the person committing the fraud, it would apparently be sufficient to vitiate the contract. It has been well said by Lord *Mansfield*, speaking on another subject, that although a third person shall not be punished for the fraud of another, he shall not avail himself of it. *Robson v. Calzee*, Doug. 228.

Still there are many cases in which the opinion expressed generally by *Pothier* would be certainly just; for instance, if one man proposes to contract with me for the purchase of goods, and another, without his collusion and for a fraudulent purpose of his own, falsely represents him as a person of fortune; this may induce an action against the last for damages; but will not defeat the contract with the first.

It may not be improper to observe, that the fraud which is at present under consideration is that which is practised upon one of the contracting parties, and not that where both parties concur in a fraud upon other persons, and which from a regard to the principles of general propriety is excluded from the assistance of the law even as between themselves.

§ IV. *Of Inequality (Lesion) in Contracts. (a).*

[33] Equity ought to preside in all agreements ; hence it follows that in contracts of mutual interest, where one of the contracting parties gives or does something for the purpose of receiving something else as a price and compensation for it, an injury suffered by one of the contracting parties, even when the other has not had recourse to any artifice to deceive him, is alone sufficient to render such contracts vicious. For as equity in matters of commerce consists in equality, when that equality is violated, when one of the parties gives more than he receives, the contract is vicious for want of the equity which ought to preside in it.

Besides, there is an imperfection in the consent of the party injured, for he would not have given what he has given, except upon the false supposition that what he was receiving in return was of equal value ; and he would not have had any disposition to give it if he had known that what he received was of inferior value.

It is to be observed, 1st, that the price of things does not ordinarily consist in an indivisible point ; there is a certain latitude within which there is room for the contracting parties to contest ; and there is no injury, nor consequently any want of equity in a contract, unless what one of the parties receives is above the highest or beneath the lowest value of what he gives.

[34] 2. Although any injury whatever renders contracts inequitable, and consequently vicious, and the principle of moral duty (*le for interieur*) induces the obligation of supplying the just price ; persons of full age are not allowed in point of law to object to their agreements as being injurious, unless the injury be excessive, a rule wisely established for the security and liberty of commerce, which require that a person shall not be easily permitted to defeat his agreements ; otherwise we should not venture upon making any contract for fear that the other party, imagining himself to be injured by the terms of it, would oblige us to follow it by a lawsuit.

That injury is commonly deemed excessive which amounts to more than a moiety of the just price. And the person who has suffered such an injury may within ten years obtain letters of rescission for annulling the contract.

(a) In the preceding parts of this article the law of *England* very nearly accords with the civil law in its exposition of the general principles of justice. Upon the present subject there is a considerable diversity ; the *Roman* law and the law of *France* having interposed an objection on the ground of inequality, which would be only admitted in *England* in a very inferior degree. The following view of the subject by *Pothier* however, comprises several principles which will admit of an application beyond the limits of the positive institution to which they more particularly relate.

[35] But there are certain agreements in which equality is more particularly requisite, such as partitions between co-heirs or co-proprietors. With regard to these, if the injury exceeds a fourth of the just price, it is a sufficient ground for restitution.

[36] On the other hand there are certain agreements, in which persons of full age are not entitled to restitution, be the injury ever so considerable.

Such are compromises according to the edict of *Francis II. April 1560*. These are agreements respecting pretensions upon which there are impending or expected litigations.

The reason of this edict is deduced from the particular character of these agreements. In other contracts of interest each of the parties intends to receive as much as he gives, and not to admit of any relaxation in respect of what belongs to him. His consent then is not entirely perfect when he suffers an injury in the terms; for it is founded upon an error in supposing that he receives as much as he gives; and it is upon this ground of his consent being defective that he is admitted to restitution; on the contrary with respect to compromises; by the very nature of the agreement, the intention of the parties is the avoidance of litigation, even at the expence of what belongs to them.

On these principles the edict should not be understood as applying to agreements which do not decide any contest, and which, for instance, contain only a partition, although the notary may qualify them by using the word *compromise*, (*transaction*); for the effect of the act ought not to be regulated by the name which the notary gives to it, but by the nature of the act itself.

[37] Restitution can hardly be admitted upon the ground of inequality, when the price of the thing which is the object of the contract is so uncertain, that it is difficult or almost impossible to determine what the just price is, and consequently to judge whether the injury is above or below the half.

Such is a sale of the right succession, for the uncertainty of the debts with which it may be charged renders the value of it extremely uncertain.

Such are all aleatory contracts; for although the risk which is undertaken by one of the contracting parties may admit of appreciation, it must be admitted to be extremely difficult to determine what the just price is. And therefore restitution can hardly be allowed, on account of inequality, in the case of life-annuities, (*constitutions des rentes viagères*), insurances, &c.

[38] A purchaser who gives more than double the value of an estate is not admitted to restitution when the excess above the intrinsic value is the price of affection.

[39] Contracts which relate only to moveables are not subject to rescission, on the ground of inequality, however great it may be.

The reason of this may perhaps be that our ancestors deemed riches to consist in immovable property, and made little account of moveables; hence it arises that, in most of the subjects of *French* jurisprudence, moveable property is but slightly attended to. There is also another reason arising from the frequent commerce of articles that pass through several hands in a short space of time; which would be liable to interruption if restitution on account of inequality were allowed in respect of moveables.

Neither is restitution on account of inequality allowed in the case of leases of estates, for these leases only convey a disposition of the fruits, and are in the nature of moveables.

§ V. *Of Inequality in the case of Minors.*

[40] Every thing which has been said respecting inequality applies to persons of full age. Minors are admitted to restitution; not only against any excessive inequality, but against any inequality whatever; and are even admitted to restitution in cases in which persons of full age have not that right; as in compromises.

The ordonnance of 1539, has limited the time within which they ought to demand this restitution; and does not allow them to be received after they have attained the age of thirty-five years.

Observe that the ordonnance does not say within ten years after their majority; because there are provinces in which persons become major at twenty; as in *Normandy*.—It was intended to place all the citizens in this respect upon a level, and that they should all be intitled to restitution until they had accomplished the age of thirty-five.

[41] There are certain agreements against which minors who are capable of contracting, that is to say, who are emancipated, are not intitled to restitution on the mere ground of inequality any more than majors: such are agreements for the alienation or acquisition of moveables; the custom of *Orleans* has a disposition to this effect in article 446 (a).

§ VI. *Of*

(a) The law of *England* has not in general admitted inequality as a primary and substantive objection, though it may often be very material evidence to taint a contract with fraud, oppression, or usury. The authorities upon the subject are collected by Mr. *Fenblague*, in his notes to the *Treatise of Equity*, B. I. c. 2. s. 9. which I take the liberty to transcribe;

§ VI. Of the Want of a good Consideration.

[42] Every contract ought to have a just cause (or consideration). In contracts of mutual interest the cause of the engagement by each of the parties, is the thing given or done or engaged to be given or done, or the hazard incurred, by the other. In contracts of beneficence, the liberality which one of the parties intends to exercise towards the other is a sufficient cause for the engagement contracted in his favour. But where an engagement has no cause, or, which is the same thing, where the cause for which it is contracted is false, the engagement is null, and so is the contract which includes it. For instance, if upon the false supposition that I owe you a thousand pounds, left you by the will of my father, which has been revoked by a codicil, whereof I am not apprized, I engage to give you a certain estate in discharge of that legacy, the contract is null, because the cause of my engagement, which was the acquittance of a debt, is false; therefore the falseness of the

“ I have not been able to find a single case in which it has been held that mere inadequacy of price is a ground for the court to annul an agreement though executory, if the same appear to have been fairly entered into, and understood between the parties, and capable of being specifically performed; still less does it appear to have been considered as a ground for rescinding an agreement actually executed. In the case of *Kien v. Starkely*, *Gilb. Rep.* 155. the court expressly held that the exorbitancy of price was not sufficient to discharge the defendant from the performance of his contract; the decree for a specific performance was indeed afterwards reversed, but not upon the ground of inadequacy of consideration; but because the plaintiff had not made out his title by the time stipulated. 2 *Bro. P. C.* 396 *. In *Willis v. Ternegan*, 2 *Atk.* 251. Lord Hardwicke held that it is not sufficient to set aside an agreement in equity to suggest weakness and indiscretion in one of the parties who has engaged in it; for supposing it to be in fact a very hard and unconscionable bargain, if a person will enter into it with his eyes open, equity will not relieve him upon this footing, unless he can shew fraud. See also *Floyer v. Sherrard*, *Ambl.* 18. In *Gwynne v. Heaton*, 1 *Bro. Ch.* 9. Lord Tenterden observes, that to set aside a conveyance there must be an inequality so strong, gross, and manifest, that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it. And in *Spratley v. Griffith*, 2 *Bro. Ch.* 179. in a note to *Heathcote v. Paignon*, the Chief Baron assigned as a ground for the decree, that there was no case in which mere inadequacy of price, independent of other circumstances, had been held sufficient to set aside a contract. In addition to this concurrence of authority, a very strong argument in support of the rule may be drawn from those cases in which losing bargains have been actually established and decreed. *City of London v. Richmond & al.* 2 *Vern.* 423. *Wood v. Fenwick*, 1 *Eq. Ab.* 170. *Nichols v. Gould*, 2 *Ves.* 422. and the case referred to by Lord Chancellor Tenterden in *Martimer v. Copper*, 1 *Bro. Ch.* 158.

“ But though courts of equity will not relieve against agreements merely on the ground of the consideration being inadequate, yet if there be such inadequacy as to shew that the person did not understand the bargain he made, or was so oppressed that he was glad to make it, knowing its inadequacy, it will shew a compulsion over him which may amount to fraud, *Heathcote v. Paignon*, 2 *Bro. Ch.* 175. a”.

The English law respecting minors is not referable to the question of inequality.

* [8vo, edit. i. 191, and see the note to the cases of *Fraud* in that edition, iv. 297.]

cause being discovered, you are not only without any right of action to compel me to deliver the estate, but even if I have delivered it I am entitled to reclaim it, and my right of action according to the *Roman* law was called *condictio sine causa*, which is the subject of a title in the *Digest*.

[43] When the cause for which the engagement is contracted is repugnant to justice, good faith, or morals, the engagement and the contract containing it are null. This principle seems to decide a question which often occurs [in *France*]. An estate is seized under an hypothecation and adjudged to be sold ; the owner makes an agreement with the purchaser to receive a certain sum for giving up the writings. The decision of the question, whether this agreement is valid, depends upon whether the cause of the agreement is repugnant to justice, which it certainly is ; for the writings are accessory to the estate as much as the keys are accessory to a house ; and it is the nature of such accessories to belong to the same person as the principal thing to which they relate. *Accessoria sequuntur jus ac dominium rei principalis*. The writings then belong to the purchaser, as the adjudication, by giving him the property of the estate, gives him also the writings belonging to it ; and the debtor, when he hypothecated the estate (a), consented that there should be a decree for the sale in default of payment, and therefore is obliged to give it up, together with the writings, as much as if he had sold it himself. He cannot retain them without injustice. The agreement by which he exacts a sum of money for delivering them up is therefore founded upon a cause repugnant to justice, which renders it null. Therefore, not only is the debtor without any right of action for enforcing such an agreement, but even if the money is paid, he is subject to an action for the recovery of it.

[44] With respect to this action, it is very necessary to distinguish accurately, whether the cause for which a promise is made is repugnant to justice or morality on the part only of the person to whom it is made, or both on the one side and the other ? An example of the first kind has just been stated. When the debtor insisted upon a sum of money for giving up the writings, it was on his part only that any thing was done repugnant to justice ; the other party had done nothing repugnant to justice or morality by promising a sum of money for the writings, which he had occasion for, and which the debtor would not give up without. It is in such a case as this, and others depending upon similar principles, that a party has a right of recovering what is given in pursuance of the agreement.

(a) A solemn contract passed before a notary gave, without any special declaration, a right of hypothecation upon the estates of the debtor.

An example of the second kind is where an officer promises a sum of money to a soldier to fight with a soldier of another regiment. The cause of this engagement is repugnant to morality on both sides; for the officer has no less acted in contravention to law and morals by making such a promise, than the soldier by receiving it. This second case agrees with the former so far as that the engagement is null, having a cause which is repugnant to morality; and consequently no action can result from it; and the soldier, after having fought, cannot demand from the officer the money which he has promised: but the cases differ, inasmuch as if the officer, in execution of the void engagement, pays the money agreed upon, he is not entitled to recover it back; for, having no less than the soldier offended against law and morality, he is unworthy of the assistance of the law for such a purpose.

This two-fold decision is included in the very terms of the laws themselves. *Ubi dantis et accipientis turpitudine versatur, non posse repeti dicimus. Quotiens autem solius accipientis turpitudine versatur, repeti potest; l. 3 & 4. Ff. de condic. ob turp. caus. (a).*

[44] There is no doubt, according to these principles, that if I promise any thing to a person for committing a crime; for instance, beating another with whom I am at variance, I am not in point of law obliged to fulfil my promise. There is more difficulty in deciding the question as a matter of conscience. *Gratius* maintains that the promise is not obligatory so long as the crime is not committed, and that up to that time the party making the promise may retract and give a countermand to the other; but that as soon as the act is committed, the promise becomes obligatory by the rules of natural law and in point of conscience. The reason is, that the promise is vicious, inasmuch as it is an inducement to a crime; but that vice is at an end as soon as the crime is committed and consummated. As the vice of the promise no longer exists, there is nothing to prevent the promise having its effect, which consists in obliging the person making it to accomplish it. He states the instance of the patriarch *Judah* discharging the promise which he made to *Thamar*.

Puffendorf on the contrary thinks that a promise made to a person for committing a crime is no more obligatory after his committing it than before; because the recompence of a crime which is involved in the accomplishment of such a promise, is no less contrary to natural law and good morals than the invitation to the crime. And if after the commission of the crime the accomplishment of the promise is no longer an inducement to the commission of that crime,

(a) This principle is fully adopted in the *English* law. In an Essay on the actions for money had and received I have considered it at length.

it is an inducement to the commission of others. Besides, every obligation supposes a right in the person in whose favour it is contracted. When I promise any thing to a person for committing a crime, the acceptance of the promise is not less criminal on his part, than the making it is on mine. Now can a crime ever be allowed to produce the acquisition of a right? Can it be thought that the law of nature is so favourable to villains as to assure them the reward of their offences? These reasons lead me to adopt the opinion of *Puffendorf*.

[45] I equally subscribe to the decision which he afterwards makes, that if I have voluntarily paid after the crime committed, what I promised for the commission of it, I have no more claim to recover it back in point of conscience than in point of law, although I have paid what was not due from me. It is true that both natural and civil law allow a right of action for what is paid without being due when the payment is made by error; it is supposed in this case that the payment was made under a kind of condition, that it should be refunded if found not to be due. Though such condition is not formally it is virtually interposed; it is conformable to the disposition of mind of the person paying; equity, which does not permit one man to enrich himself at the expence of another, implies this condition; but there can be no such implication in the case in question. The person who pays has a perfect knowledge of the cause of payment; he therefore cannot retain a right to the recovery of what he has parted with voluntarily, and with a perfect knowledge of the cause. It is true that it is contrary to natural law that any one should be rewarded for a crime; and that his repentance for the crime ought to make him renounce the reward he has received; but this only forms an imperfect obligation, such as was spoken of at the beginning of the treatise, without giving a right to any other person.

[46] Has a promise a licit cause when it is made to a person for his giving or doing something which he is obliged to give or do already? *Puffendorf* in respect of this question very properly marks the distinction between a perfect and an imperfect obligation; when there is only an imperfect obligation, the promise has a lawful cause, and is obligatory. For instance, if I promise something to a person for doing me a service; although gratitude for favours which he has received from me bind him to render me the service gratuitously; nevertheless my promise has a licit cause and is obligatory; for not having any right to demand that service from him he may lawfully, however unbecomingly, require something from me in order to afford me a right to the service which I did not otherwise possess.

On the contrary, when it is a perfect obligation the promise is a nullity, and has an illicit cause if it is exacted by him from me, as in the case before mentioned of the promise of a reward for giving up the writings; for being obliged to give them up, it is an exaction on his part to require any thing for doing so.

But even in the case of a perfect obligation, if a promise, that I make my debtor for something that he was already obliged to do, is a voluntary promise of mine, and not exacted by him, it is valid, and has a licit and honest cause; that cause being the liberality which I intend to exercise towards him (a).

§ VII. Of Want of Obligation (*Lien*) in the Person promising.

[47] It is of the essence of agreements which consist in promising something, that they should produce an obligation in the party making the promise to discharge it; hence it follows, that nothing can be more contradictory to such an obligation, than an entire liberty in the party making the promise to perform it or not as he may please. An agreement giving such entire liberty would be absolutely void for want of obligation. If, therefore, I agree with you to give you something in case I please, such an agreement is absolutely void.

The *Roman* lawyers thought it would be otherwise where a person promised to do a thing *when* he pleased, that these terms did not leave it to the choice of the party whether he would do what he had promised or not, but only left him at liberty as to the time when he would perform the promise; and that the agreement was valid and binding on his heirs if he died without having performed it. *L. 46. § 2 & 3. ff. de verb. obl. (b)*. But there is reason to think that such a subtle distinction would not be admitted in the *French* jurisprudence, and that this agreement would be no more binding than the other.

[48] There is a real obligation contracted if I promise to give you something in case I judge it reasonable; for it is not left to my choice to give it you or not, since I am obliged to do so in case it is reasonable. *l. 11. § 7. leg. 30. (c)*.

(a) *Vide* Appendix, No. I.

(b) *Si ita stipulatus fuero, cum volueris, quidam inutilem esse stipulationem aiunt: alii ita inutilem, si antequam constituas, morieris, quod verum est. Illam autem stipulationem, si volueris dari? inutilem esse constat.*

(c) *Quamquam autem fideicommissum ita relictum non debeat si volueris, tamen si ita adscriptum fuerit, si fueris arbitratus, si putaveris, si aestimaveris, si utile tibi fuerit visum, vel videbitur, debetur non enim plenum arbitrium voluntas heredi dedit, sed quasi viro bono commissum relictum.*

Lastly,

Lastly, though I promise something under a condition, which depends upon my will whether I will accomplish it or not (*condition protestative*) as, if I promise to give you ten pistoles in case I go to *Paris*, the agreement is valid; for it is not entirely in my power to give the money or not, since I can only refuse to do so in case I refrain from going to *Paris*. There is then on my part an obligation and a real engagement. *L. 3. ff. de legat. 2 (a).*

A R T I C L E IV.

Of Persons capable or incapable of Contracting.

[49] The essence of a contract consisting in consent, it follows that a person must be capable of giving his consent, and consequently must have the use of his reason in order to be able to contract.

It is therefore evident that children, persons wholly destitute of reason, and such as are occasionally so during the continuance of their infirmity, cannot contract by themselves, but they may contract by the ministry of their tutors or curators.

It is evident that drunkenness, when it goes so far as absolutely to destroy the reason, renders a person in this state, so long as it continues, incapable of contracting, since it renders him incapable of consent (*b*).

[49] Communities, or bodies corporate, which are not civil persons, cannot contract by themselves, but they may contract by the ministry of their syndics or administrators (*c*).

[50] There are persons who, being by nature capable of contracting, are rendered incapable by law; such, in some provinces, are married women, unless they are authorized by their husbands, or by courts of justice, for it is an effect of the power of the husband, that the wife can only act as authorized by him; whence it follows, that she is incapable of making any agreement, and can neither oblige herself in favour of others, or others in favour of herself.

It is also the civil law only which renders persons under an interdiction for prodigality, incapable of contracting: for these persons

(a) *Si ita legatur, Heres dare damnas esto, si in Capitolium non ascenderit; utile legatum est, quoniam in potestate ejus sit ascendere vel non ascendere. Vide Appendix, N^o. I.*

(b) *Vide Appendix, N^o. II.*

(c) According to the law of *England*, bodies corporate contract Obligations, and do other acts by means of a common seal.

know what they do ; the consent which they give is a real consent, which is sufficient to form a contract.

[51] Hence arises a difference between these persons and those who are interdicted for insanity. All the contracts pretended to be made by the latter though before interdiction are null, provided it be shewn that they were insane at the time of the contract, for their insanity alone and of itself, renders them incapable of contracting independently of the sentence of interdiction, which is merely a declaration of it : on the contrary, contracts made by a prodigal before his interdiction are valid, although he was a prodigal at the time ; for he is only rendered incapable by the sentence of interdiction ; it is that alone therefore which renders him incapable of contracting.

Nevertheless, if I have contracted with a prodigal, though before his interdiction, by buying something from him, or lending him money, knowing that he was only selling or borrowing to raise money for his dissipations, the contract would be void in point of conscience, and I could neither conscientiously retain the thing that was sold, nor require to be repaid the money lent ; for by knowingly supplying him with money to spend in dissipation, I have done him an injury, which I am obliged to repair, either by not exacting the money lent, or restoring the property sold ; this is conformable to what is said at the end of law. 8. ff. pro. empt. that we ought not to regard a person as a *bona fide* purchaser who buys something of a libertine, knowing that he only sold it to carry the price to a brothel. *Nisi forte is qui a luxurioso, et protinus scorto daturō pecuniam, servos emit, non usucapiet.*

These decisions hold good in point of conscience, but in point of law, a person of full age, and not under interdiction, would not be admitted to relieve himself against a sale or a loan, by alleging that the person with whom he contracted knew that his only motive in selling or borrowing, was to squander the money in dissipation (a).

[52] It is likewise only civil law which invalidates the obligations that minors, under the power of a tutor, contract without the authority of their tutor, when at the time of the contract they are of sufficient age, and have sufficient use of their reason to comprehend the whole extent of the engagement they contract ; wherefore minors may very well, even in point of conscience, take

(a) Interdictions for prodigality are unknown to the law of *England*, but the courts of equity will watch very narrowly contracts made with young persons engaged in a course of dissipation, in order to obtain their property or expectations, at an inferior value ; and, in some recent cases, persons have not been allowed to recover the debts incurred in promoting habits of dissipation ; but these topics have only an incidental relation to the present subject ; as they relate rather to the matter of the contract, than to the capacity of the person.

the benefit of letters of rescission against injurious contracts, as natural equity does not permit those who have contracted with them to take advantage of their want of experience, but they cannot conscientiously have recourse to the exception allowed them in point of law, against restoring the money which they have received and dissipated, if at the time of entering into the contract, they had sufficient use of their reason; and the person lending them the money did so, fairly, without knowing that it would be applied in foolish expences. This is the sentiment cited by *Barbeyrac* in his notes on *Puffendorf*.

It remains to observe a difference between the incapacity of interdicts and minors, and that of women under the power of their husband; the latter are incapable of contracting without being authorised; they can no more oblige others towards them, than they can oblige themselves; they cannot even accept a donation which may be made to them.

On the contrary, interdicts for prodigality, and minors, who begin to have some use of their reason, are rather incapable of obliging themselves by a contract, than absolutely incapable of contracting; they may, by contracting without the authority of their tutor or curator, oblige others to them, although they cannot oblige themselves to others; *placuit meliorem conditionem licere eis facere etiam sine tutoris auctoritate, Instit. tit. de auctor. tut. Is cui bonis interdictum est, stipulando sibi acquirit, L. 6. ff. de verb. oblig.* The reason of this difference is, that the power of tutors and curators is only established in favour of minors and interdicts, and their assistance is only necessary for the interest of the persons under their charge, and from the apprehension of their being deceived, and consequently such assistance becomes superfluous, when in fact they make their condition better; on the contrary, the power of the husband being established, not in favour of the wife but of the husband, and the necessity of requiring his authority not being established for her interest, but on account of the deference which she owes, she cannot contract in any manner, whether for her advantage or detriment, without such authority (a).

The ordonnance of 1731 does not by any means impeach the principle which we have laid down, that a minor may without the authority of his tutor render his condition better. *Furgolle* therefore is not correct in maintaining, that according to the 7th article

(a) No authority or concurrence of the husband can, according to the law of *England*, affect a married woman personally with the obligations arising from a contract, though there are cases in which her acts operating *in rem* have the effect of binding her property.

In *England* any gift to a married woman continues good until the husband dissents. His positive assent is not necessary to its validity.

of this ordonnance, minors cannot without the authority of their tutors, accept the donations which are made to them. This article only decides, that the father, mother, and other progenitors, without being tutors of their children, and consequently without having any quality to manage their affairs, may accept donations made to their infant children as effectually as a tutor, natural affection otherwise wanting; but it does not follow that because the ordonnance by this article permits such persons to accept donations made to their children, minors are forbidden to accept them themselves, when they have the use of their reason (a).

ARTICLE V.

Of what is capable of being the object of Contracts, and of the rule of the civil law, that it can only be something which concerns the contracting parties, according to the principle that a person cannot effectually promise or stipulate except for himself.

[53] Contracts have for their object either something which one of the contracting parties stipulates for being given to him, and which the other party promises to give, or something which one of the party stipulates to be done or not done, and the other promises to do or not to do.

What things may be so stipulated and promised will be mentioned hereafter, *Chap. II. art. 2.* to which at present we refer; contenting ourselves here with the developement of a principle respecting what may be the object of contracts, to wit, that nothing but what one of the contracting parties stipulates for himself, and what the other promises for himself, can be the object of a contract. *Alteri stipulari nemo potest INST. DE INCERT. STIP. Nec paciscendo, nec legem dicendo, nec stipulando quisquam alteri cavere potest, l. 73. De reg. jur. VICE VERSA. Qui alium facturum promisit videtur in ea esse causa ut non teneatur nisi pœnam ipse promiserit. Inst. dic. tit. §. 20. Alius pro alio promittens daturum facturumve non obligatur, nam de se quemquem promittere oportere. L. 83. ff. de verb. obl.*

In order to develope this principle, we shall 1st, examine what are the reasons of it; 2d, we shall state several cases in which we stipulate and promise effectually for ourselves, though the agreement makes mention of other persons; 3d, we shall take notice, that what concerns other persons than the contracting parties, may be the mode or condition of an agreement, though it cannot be the object of it; 4th, we shall observe that we may stipulate or contract

(a) *Vide Appendix, N°. III.*

by the ministry of a third person, and that this is not to stipulate or promise for another.

§ I. *Reasons of the principle that a person cannot stipulate or promise for another.*

[54] When I stipulate with you for a third person the agreement is void : for by this agreement you do not contract any obligation in favour either of such third person or myself. It is evident that you do not contract any in favour of the third person : for it is a principle that agreements can have no effect except between the contracting parties, and consequently that they cannot acquire any right to a third person who is not a party to them, as we shall see hereafter. By this agreement you do not contract any civil obligation in my favour ; for, what I have stipulated in favour of the third person, not being any thing in which I have an interest capable of pecuniary appreciation, no damages can result to me from a failure in the performance of your promise, and therefore you may be guilty of such failure with impunity. Now nothing is more repugnant to the nature of a civil obligation than a power to contravene it with impunity. This is the meaning of *Ulpian* when he says, *Alteri stipulari nemo potest, inventæ sunt enim obligationes ad hoc ut unus quisque sibi acquirat quod sua interest, ceterum ut aliis detur, nihil interest, L. 38. §. 17. ff. de verb. Obl.*

[55] This first part of the principle, that nothing but what one of the parties stipulates on his own behalf can be the object of an obligation, only prevails when considered as a matter of law, (*dans le for exterieur*) and with respect to civil obligations ; but in point of conscience, if I agree with you that you shall give something to, or do something for, a third person, the agreement is binding : although the interest which I have in the subject is not capable of pecuniary appreciation, still it is a real interest : *hominis enim interest alterum hominem beneficio affici*, and this interest arising from mere affection for a third person, gives me a sufficient right in point of conscience, to require the performance of your promise, and is sufficient to render you culpable in refusing to accomplish it, provided you have it in your power, and the other person is willing to accept of what was promised to be given. It is true that my interest not admitting of pecuniary appreciation, and consequently not being the object of a judicial sentence, I cannot call upon you for any satisfaction in damages if you fail in the performance of your promise ; but your power of avoiding legal responsibility, though an obstacle to its being a civil obligation, does not prevent it from being a natural one. *Grotius L. 2. c. 11. n. 18.*

It must be observed that the natural obligation resulting from this agreement by which I stipulate for your giving something to a

third person, is an obligation contracted in favour of me, and not of that person, when the agreement is made in my name and not in his, therefore I may release you from it without his consent, *Grotius, ibid. Puffendorff*.

But if the agreement were made in his name, and as having been entered into by a commission from him, the agreement would be made with him by my agency, and not with me.

[56] The second part of the principle, that a person can only promise for himself, is evident ; for when I promise that another shall give you any thing, or do any thing, without undertaking that it shall be done, or promising any thing on my own part, the agreement can neither oblige the other nor myself. It will not oblige him, because it is not in my power to oblige another person without his own act ; neither will it oblige me, for as it is part of the supposition that I promised for another and not for myself, I am not understood to be bound by it.

But a presumption will be readily admitted, that a person who promises that another shall give or do something should not be understood *purè de alio promittere*, but to promise for himself, that is to say, to engage for the performance of the act by the third person, although it is not so expressed, and in this case he will be liable to answer in damages for the non-performance. *L. 81. ff. de verb. obl. (a)*.

If in promising for the act of another, you submit to pay a certain penalty, or even merely to answer in damages for the non-performance, it is clear that you are not to be understood as promising simply for the act of another, *et de alio tantum promittere*, but as undertaking in assurance of that other *et de te promittere*. Therefore *Ulpian* says, *Si quis velit alienum factum promittere, pœnam vel quanti ea res est potest promittere. L. 38. §. 2. ff. dic. tit. (b)*.

§ II. Several Cases in which the Parties effectively stipulate or promise for themselves, although another Person is mentioned.

C A S E I.

[57] To stipulate that any thing shall be delivered or paid to a third person designated by the agreement, is not to stipulate for another. For instance, if I contract to sell you an estate for a thousand pounds, which it is agreed shall be paid to *Peter*, it is not for him, but for myself, that I make this stipulation ; *Peter* is only introduced into the agreement as a person to receive the money for me and in my name, and is what the *Roman* jurists call *adjectus solutionis gratia*.

(a) Quotiens quis alium sibi promittit, nec adjicit pœnam (puta vel servum suum, vel hominem liberum) quaeritur, an committatur stipulatio ? Et *Celsus* ait, etsi non est huic stipulationi additum, nisi steterit, pœnam dari : [in] id quanti, interest sibi, contineri, et verum est quod *Celsus* ait ; nam qui alium sibi promittit, hoc promittit, id se acturum, ut stet.

(b) Vide Appendix No. IV.

The credit for that sum does not reside with him but with me : when he receives it, it is on my behalf and in my name ; and on his receiving it there arises between him and me either the contract mandate, if my intention was that he should render me an account ; or a donation, if it was my intention to give it him.

C A S E II.

[58] It is not stipulating for another but for myself, when I stipulate that something shall be done for a third person ; if I have a personal and appreciable interest it shall be done ; suppose for instance I have contracted with him to do it. Thus, if I have engaged to *James* to rebuild his house in a certain time, and having other work to do, I contract with a mason that he shall rebuild the house, I stipulate for myself rather than for *James*, and the agreement is valid : for as I am under an obligation to him, and am answerable in damages if the work is not done, I have a real personal interest that it shall be done. Wherefore, in stipulating that the mason shall rebuild the house of *James*, it is only *verbo tenus* that I stipulate for *James* ; *re ipsa* and in truth I stipulate for myself and for my own benefit.* *Si stipuler alii cum mea interesset, ait Marcellus, stipulationem valere, L. 38. § 20, 21, 22, ff. de verb. obl.*

[59] Even if I have not entered into the engagement with *James* before I made the agreement with the mason, and consequently had no personal interest in the subject, yet as I undertake to conduct the business of *James*, and thereby render myself accountable to (a) him from the very time of the agreement, I begin thereby to have an interest in the re-construction : from whence it follows, that I am deemed to stipulate rather for myself than for *James*, and the contract is valid, as I have a personal interest that the mason shall do in a proper manner the act which I stipulate to be done.

[60] But if I stipulate in my own name that a person shall do something for another, without having either before, or at the time of the agreement, any personal interest that it shall be done, this is really to stipulate for another, and such an agreement is not valid in point of law, (*dans le for exterieur*,) for instance, if from mere regard for *James* I agree with a person who has a building opposite to his windows, that he shall whiten the walls in order to throw a greater light into the rooms of *James*, such an agreement will not give any right either to *James*, who is not a party to it, nor to myself, who, not having any personal and appreciable interest in

(a) This is founded upon the *quasi contract negotiorum gestio*, which is, where a person, without previous authority or directions, takes upon himself to transact the business of another, and if that other afterwards assents, the same consequences ensue as if there had been a preceding authority.

the execution of this agreement, cannot claim any damages for the non-performance of it.

C A S E III.

[61] It is stipulating or promising for ourselves and not for another, when we stipulate or promise for our heirs, since they are as it were the continuation of ourselves. *Hæres personam defuncti sustinet*, therefore there is no doubt we may stipulate for our heirs, *hæredi cavere concessum est*. L. 10. ff. de pact. dot. L. 38. ff. 14. ff. de verb. obli.

[62] Observe, that we stipulate effectually when we stipulate for our heirs in the character and capacity of our heirs; but if we stipulate for a particular person, who afterwards happens to become our heir, the stipulation is not thereby rendered valid, L. 17. ff. 4. ff. de pact. (a.)

(b) *Julian* has carried the rigour of this principle so far as to decide, that when a debtor agreed with his creditor that he should not require the sum which was due to him either from himself or from his daughter, the stipulation would not be valid with respect to the daughter, although she should become the heir of the debtor. *Bruneman* is of opinion, and with reason, that this too literal decision ought not to be followed, for when I stipulate with my creditor, that he shall neither require from myself nor from my daughter the money which I owe him, it is manifest that I only stipulate for my daughter in the event of her becoming the debtor, now that can only be in the case of her becoming my heir, and consequently I am supposed to stipulate for my daughter in her future quality of my heir, although that is not expressed.

We shall be still further warranted in disallowing this decision of *Julian*, as it appears that the *Roman jurists* were not unanimous upon this question; *Celsus* appears to have thought differently in the law, 33 ff. de pact. (c.)

[63] We may not only make a valid stipulation for our heirs, but are commonly understood to have done so, although it is not expressed; *qui paciscitur sibi, hæredique suo pacisci intelligitur*.

This rule is subject to an exception: 1st, When the object of

(a) Si pactus sum ne a me neve a Titio petatur, non proderet Titio etiam si hæres extiterit, quia ex post facto id confirmari non potest.

(b) Hoc *Julianus* scribit in patre, qui pactus erat ne a se neve a filia peteretur; cum filia patri hæres extitisset.

(c) Avus neptis nomine, quam ex filio habebat, dotem promisit, et pactus est, ne a se, neve a filio suo dos peteretur; si a coherede filii dos petatur, ipse quidem exceptione conventionis tuendus non erit, filius vero exceptione conventionis recte utetur; quippe heredi consuli concessum est, nec quicquam obstat, uni tantum ex heredibus providere, si heres factus sit, cæteris autem non consuli.

the agreement is a fact which is personal to him in whose favour it is contracted, as if I agree with a barber to come to shave me twice a week at my country-house during the vacation : 2d, (a) When it is clearly expressed by the agreement, that the party engaging obliges himself in favour of the other party to the contract, and not in favour of his heirs ; but this must be clearly expressed, and although the person in whose favour I contract an engagement is named in the agreement, it does not follow that the intention was to confine to his person the right resulting therefrom. It may be understood on the contrary, that he is only named to indicate with whom the agreement was made, *plerumque persona pacto inferitur, non ut personale pactum fiat, sed ut demonstretur cum quo pactum fiat*, L. 7. § 8. *Wissembach, ad tit. ff. de pacto. no. 7.*

[64] We may also restrain our stipulation to one of our heirs, *non obstat uni tantum ex heredibus provideri, si heres factus sit, ceteris autem non consuli*, L. 33. *ff. de pact.* for instance, I agree with my creditor that he shall not demand his debt either from me or from my daughter, and I leave that daughter and a son my heirs, the agreement will only take effect as to the daughter, as being alone comprised in it, and the creditor may demand the debt from my son, as to the part for which he is heir.

It must not, however, be always inferred from a person stipulating for a particular heir by name, that the intention of the contracting parties was to restrain the stipulation to that person ; this may be very well inferred, if at the time of the agreement the person making such a stipulation knew that he would have other heirs, for in this case there does not appear any other reason for stipulating for one in particular, than to restrain the stipulation to that one ; on the other hand, if the party stipulating for a particular heir, had at the time of the agreement reason to suppose that the person named would be his only heir, there is room to think that the name is only inserted in the agreement by way of mere enunciation, and not with a view to restrain the effect of the stipulation to his person. This is shewn by *Papinian* in the following case :

Having married my daughter, to whom I promised a portion after my decease : under the supposition that I should not have any other children, and with the intention of instituting my brother as my heir, I stipulate in the agreement for the portion, that if my daughter should die without children, during the marriage, (in which case the whole of the portion, according to the Digest, would belong to the husband) my brother might, as my heir, retain a moiety of the portion. Having afterwards other children, whom I leave as my

(a) There is an intermediate exception founded on the technical rules of the French law, the terms of which it is thought unnecessary to insert.

heirs ; and my daughter having died without children during the marriage, the question arises, whether my children may, as my heirs, retain a moiety of the portion ? The reason of the doubt is, that the stipulation is made for my brother by name, from whence it might appear that it was restrained to his person, and to the case of his being my heir ; but *Papinian* decides that my children are justified in retaining a moiety of the portion, by virtue of the agreement, because in stipulating for this retention on behalf of my brother, I am deemed, by using the term *my heir* to have stipulated for my heirs whoever they might be, and to have named my brother *enunciativé*, and, by way of indication, that I supposed that he would be my heir. *Pater qui dotem promisit pactus est ut post mortem suam in matrimonio sine liberis defuncta filia portio dotis apud heredem suum fratrem remaneret ; ea conventio liberis a socero postea susceptis, et heredibus testamento relictis, per exceptionem doli proderit ; cum inter contrahentes ita actum sit, ut heredibus consulatur, et illo tempore, quo pater alios (filios) non habuit in fratrem suum judicium supremum contulisse videatur. L. 40. § fin. ff. de Pact.* Therefore *Cujas* thinks that this decision should take place whatever heirs I might happen to leave, although they might not be my children.

It remains to observe, that when I stipulate with my creditor that he shall not demand what I owe him, the stipulation may very well be restrained to one of my heirs, so that he alone shall be discharged as to the part which will become due from him ; but when I stipulate with a person that he shall give me a certain sum of money, or other divisible thing, I cannot restrain the agreement to one of my heirs so as to entitle him to the whole. *Sciendum est quod dari stipulemur, non posse per nos uni ex heredibus adquiri, sed necesse est omnibus adquiri. L. 137. § fin. ff. de verb. Obl.*

[65] This is a consequence of the general principle that we cannot stipulate effectively for another, except inasmuch as he will be our heir, and in respect of his having that quality ; whence it follows, that he cannot succeed to us as to the whole of the right resulting from the agreement, but only as to the part for which he is heir ; it is otherwise with respect to agreements, the object of which is indivisible, such for the most part are those which are *in faciendo*, for as in those agreements each of the heirs succeeds to the entire claim by the nature of the claim itself, which is not susceptible of parts, I may in stipulating by name for one of my heirs in particular, enable him alone to succeed to the whole of the claim, *at cum quid fieri stipulemur, unius personam recte comprehendit, D. L. 137. § 3. ;* for instance, if in selling an estate to a painter, there is a clause by which he obliges himself to me, and to one of my children and future heirs, to make us a picture of the circumcision of our

our Saviour, of such a size, and I should die before he had discharged the obligation, the child named in the agreement would succeed to the whole of the demand against the painter.

[66] In the same manner as we are deemed to stipulate for our heirs every thing which we stipulate for ourselves, we are also deemed to promise for our heirs, and to engage them to every thing which we promise, at least unless the object of our obligation is a personal act, or there is some clause to the contrary.

So, in case of divisible obligations, as we can only stipulate for a particular person, so far as he shall be our heir, we can only oblige any one of our heirs as to the part for which he is our heir ; it is therefore immaterial for a debtor to comprize in an agreement a particular person, who may be one of his heirs, for he is no more bound for the debt than the other heirs not named in the agreement. *Te et Titium heredem tuum decem daturum spondes ? Titii persona supervacue comprehensa est, siue enim solus heres extiterit, in solidum tenebitur, siue pro parte, eodem modo quo ceteri cohæredes ejus. L. 56. § ff. de verb. obl. (a.)*

C A S E IV.

[67] With respect to any thing belonging to us, we may make a valid stipulation, not only as to ourselves and our heirs, but as to our successors in that property, under any particular

(a) There is very little similitude between the heirs of the civil law and the representatives of deceased persons, according to the law of *England*, so far as relates to several of the subjects included in the preceding division. The divisibility or indivisibility of obligations upon which several of the preceding distinctions are founded, and which is afterwards the immediate object of a very long discussion in *Pothier*, is a subject to which there is not in the law of *England* any thing very analogous ; neither does our system supply any thing to which the observations concerning a stipulation or promise for a particular heir can be directly applied ; but in this as in many instances, the nature and course of the reasoning may afford instruction, which can be transferred to subjects very dissimilar to that which is the immediate object of inquiry.

In the *Roman* law, the heirs succeeded to the obligations of the ancestors without any reference to the adequacy of the property. Where there were several heirs, and the nature of the subject admitted of division, there were so many distinct claims and distinct obligations ; the difference between real and personal representatives, which in the law of *England* is a subject of much extent and importance, was from the nature of the system absolutely unknown.

In *England*, the term *heir* is confined to real estates, descending by operation of law to persons standing in a certain relation of consanguinity to the person deceased. The right of actions, which descends upon heirs, is confined to such covenants as have an immediate relation to the property so descended. The right of action against heirs is allowed upon all engagements by deed where the heirs are specially named to the extent of the property descended ; but not upon any contract not by deed, or by which the heirs are not specially named, or beyond the extent before mentioned.

The deceased is, as to his personal property and obligations, represented by his executors or administrators. In general, the executor is a person appointed by the will of the deceased ; the administrator, one appointed in case of intestacy by the spiritual court : but a person

lar title, who are comprized under the name of *ayant-cause*, which is used in contracts; and this not to stipulate for another. For instance, I may make a valid agreement that you shall never put in force either against me, or against my heirs or *ayant-cause*, the rights of substitution (a), which may at some future period attach in your favour with respect to such an estate; and this agreement will be valid even with respect to those who may afterwards acquire the estate from me under a particular title.

This is indubitable with respect to those who acquire under an onerous title; for, being under an obligation of warranty to them, I have an interest that you shall not give them any disturbance; which is sufficient to render what I stipulate for them a stipulation for myself: but the decision also holds good with regard to those claiming under me by way of donation; *L. 17. § 5. ff. de pact. (b)*; although I am not under any warranty to them: for the in-

intermeddling without authority with the property is chargeable as executor, and is called executor of his own wrong. There are also administrations, though there is no intestacy, in several cases: as, an administration, with the will annexed, where no executor is named, or the executor declines; an administration of the goods not (*de bonis non*) administered by a deceased executor; an administration during the infancy or absence of the executor. In general, the executor or administrator succeeds to the rights acquired by contract in favour of the deceased, unless they are either incident to the real estate descended to the heir, or devised by will, or of a nature which is personal to the party himself, such as those above alluded to by *Potbier*; and to the extent of the property he receives, he is answerable for all the engagements entered into by the deceased, whether by deed or otherwise, and without being particularly named in the obligation, unless the undertaking is in its nature personal to the contracting party; but however personal a contract may be, if it is violated in the life-time of the party personally entitled or personally bound, I conceive it to be clear, that the right of action acquired or incurred by its violation devolves upon the representatives. Some illustrations may be stated from the *English* law, of contracts personal in their nature, and terminating with the death of the party. Such is a contract of apprenticeship, which is fiduciary, and to general purposes ceases with the death of the master, though for some particular purposes, principally arising from the law of settlements, it may be allowed to subsist so as to be productive of its effects, if in fact acted under, but not so as to induce any compulsory obligations. A bond was given for the fidelity of a clerk, with a condition to account for all money received for the obligee, his executors, &c. This was ruled to be confined to a service to the obligee, and to accounting after his death to the executors for money received in his life-time, and not to extend to a continuance in the service of the executor, after the death of the obligee. *Bacher v. Parker*, 1 T. R. 287. *Cooke* assigned some business in the vending of newspapers to *Calcraft*, and covenanted that he (*Cooke*) would not afterwards sell any newspapers; *Calcraft* engaged to pay to *Cooke*, and to his wife after his decease, 8s. a week. The wife having sued as administratrix for non-payment to her after her husband's death; *Calcraft* alleged as a defence, that she had sold newspapers contrary to the agreement. It was held, that the covenant by *Cooke* was only a restriction laid on himself, and must expire with his life. Suppose (said the Court) he had made a stranger his executor, who was a newsman, shall that executor be hindered from being a newsman? Certainly not. *Cooke v. Calcraft*, 3 Wils. 380.

(a) A right of substitution in civil law has a considerable analogy to a conditional limitation, and also to a remainder in the law of *England*.

(b) See the passage referred to in No. 68. *Pactum Convictum*, &c.

terest

terest which I have in preserving the free-disposition of what belongs to me is sufficient to enable me to make a valid agreement with you, that you shall give no disturbance to those to whom I think proper to dispose of it, by whatever title I may do so.

[68] In this agreement, and others of a similar nature which we make with reference to any thing which belongs to us, we may not only stipulate effectually for our successor (*ayant-cause*), but we are even understood to do so although it is not expressed; whether the agreement be conceived *in rem*, as when it is said, in a transaction (*a*) between us, that you will never put in force the pretensions which you may have to such an estate, without saying against whom; or whether it be conceived *in personam*, as if you were to say that you would never put your pretensions in force against me: in both the one case and the other I am deemed to have stipulated for my successors, even by particular title, even by donation. *Pañtum conventum cum venditore sic in rem constituitur, secundum Proculi sententiam, et emptori prodest. Secundum autem Sabini sententiam, etiamsi in personam conceptum est, et in emptorem valet, qui hoc esse existimat etsi per donationem successio facta sit. L. 17. § 5. ff. de pañt.* The reason is, that in stipulating for myself I am understood to stipulate for all those who represent me. Now not only my heirs, but all those who succeed either, mediately or immediately, and by whatever title it may be, to the estate which is the object of the agreement, represent me so far as relates to that estate.

[69] If I stipulate *nominatim* for my heirs, I am not understood to stipulate for those who succeed to me under a particular title; in this case *inclusio unius fit exclusio alterius*, the expression of *my heirs*, excludes the other successors. For instance, if by a transaction with the lord of a seignory of whom I hold my estate by way of service, I agree that upon any descent of any estate, he shall not require from my heirs more than one pistole by way of relief; this agreement will not avail a third person who afterwards acquires the estate from me or my heirs under a particular title. It would be otherwise, if in the clause no mention was made of heirs, and it was said indefinitely that he should never require more than one pistole, or if after the term *heirs* there was an *et cetera*. In either of these cases the clause would extend to all successors generally (*b*).

§ III. *What*

(*a*) Transaction in the civil law means a compromise.

(*b*) By the common law of *England* no action could be maintained by or against persons succeeding to any estate by grant or assignment: but by statute 38 Hen. 8. c. 34. the grantees of a reversion expectant on any lease are entitled to the same remedies, and subject to the same actions upon any covenants contained in such lease, as the grantors.

Several rules have been formed upon this subject, respecting covenants which do or do not run

§ III. *What concerns another Person than the Contracting Parties, may be the Mode or Condition of an Agreement ; although it cannot be the Object of it.*

[70] The giving any thing to a third person, and generally any thing which does not affect the personal interest of the party stipulating, cannot indeed be the object of the contract, but it may be *in conditione* or *in modo*.

Therefore, though I cannot in my own name make a valid stipulation that you shall make a present to *James of Meerman's Thesaurus*, for that is to stipulate for another ; it is to stipulate a thing in which I have not any interest ; I may effectually stipulate, that if in a particular time you do not make such a present, you shall pay a hundred additional pistoles (a) upon the purchase which you make from me ; for in this case the present to *James* is only a condition : the object of the stipulation is that you shall give me a hundred pistoles, and this I stipulate for myself, and have an interest in. This agrees with what is said by *Justinian, tit. de inut. stip. § 20. Alteri stipulari nemo potest : plane, si quis velit hoc facere, pœnam stipulare convenit, ut, nisi factum sit ut est comprehensum, committatur pœna stipulatio etiam ei cujus nihil interest.*

[71] What concerns the interest of a third person may also be *in modo* ; that is to say, that although I cannot directly stipulate what concerns the interest of a third person, nevertheless I may alienate my own property with the charge, that the person to whom I give it shall do something which concerns the interest of a third person. For instance, though I cannot stipulate in my own name directly that you shall make a present to *James of Meerman's Thesaurus*, I may effectually give you a sum of money or other thing subject to the charge of making such a present.

According to the principles of the ancient *Roman* law, the effect of this condition was confined to my having a right, in default of

run with the land ; or in other words, which are transmissible to the person taking the estate, or are confined to the immediate party to the contract or his representatives ; and also respecting cases where assigns are or are not expressly named in the covenant. But I conceive that there are many cases in which, though no action of covenant may be maintained for want of that privity which may be requisite, a court of equity would interpose to restrain the infraction of an agreement respecting the property.

In the instance adduced by *Pothier* in the last sentence, I think the construction which he gives is contrary to the intent, and that if an obligation would extend to general successors, without any mention of heirs or successors (*ayant cause*) it would have been more suitable to apply the rule, *utile ab inutili non vitatur*, than the rule adduced of *inclusio unius fit exclusio alterius*.

(a) The expression of *Pothier* in this and other instances is, "for the pot of wine of a bargain."

your

your fulfilling the charge under which you had received the money or other thing from me, to reclaim what I had given ; for, as I had only given it, and you had only received it with such a charge, there arises an implied agreement that you shall restore it unless you accomplish the charge, and I am intitled to an action for the repetition of it, called *condictio (seu repetitio) ob causam dati; causa non ecuta*.

For the rest, according to the principles of this ancient law, the third person who was no party to this contract of donation, subject to the charge of your giving him something, had not any action against you for the recovery of it : and this was founded upon the principle that contracts have no effect except between the contracting parties : hence it follows, that no right can arise from a contract to a person who was not party to it : but according to the constitutions of the Emperors, the third person in whose favour the donor imposed a charge on his donation, has an action against the donatary to compel him to execute it. This we learn from l. 3. *Cod. de donat. quæ sub modo (a)*.

[72] This engagement which the donatary contracts in favour of the third person to accomplish the charge under which the donation was made, is an engagement which is not in fact properly formed by the contract of donation, as the contract cannot in itself and *propria virtute* produce an engagement in favour of a third person who was no party to it, and give him any right in the subject. The engagement is formed by natural equity, because the donatary cannot without violating such equity, and without perfidy, retain what was given to him and not accomplish the charge under which it was given, and to which he submitted in accepting the donation. Therefore, the action is called, in the law referred to, *actio utilis*, which is the name given by the *Roman* jurists to actions which have no other foundation than mere equity, *quæ contra subtilitatem juris, utilitate ita exigente, ex sola æquitate concedebantur*.

[73] Hence arises another question, whether after giving you any thing with the charge of restoring it to a third person in a certain time, or of giving him some other thing, I can release you from the charge without the intervention of such person, who was no party to the act, and who has not accepted the liberality which I exercised in his favour. Writers are divided upon

(a) " Quoties donatio ita conficitur ut post tempus, id, quod donatum est, alii restitatur, veteris juris auctoritate rescriptum est, si is in quem liberalitatis compendium conferebatur, stipulatus non sit, placiti fide non impleta ei qui liberalitatis auctor fuit, vel hæredibus ejus condictitiæ actionis persecutionem competere. Sed cum postea benigna juris interpretatione divi principes ei, qui stipulatus non sit, utilem actionem juxta donatoris voluntatem competere admiserint".

this question. *Gratius de Jure Belli et Pacis*, II. IX, 19, decides it in the affirmative. This is also the opinion of *Bartolus*, of *Duaren* and many other doctors, and particularly of *Ricard*, *Traité de Substitut*. p. 1. ch. 4. The reason upon which they ground their opinions is, that, the third person not having intervened in the donation, the engagement which the donatary contracts in his favour is contracted by a concurrence of intention in the donor and donatary only; and consequently may be dissolved by an opposite consent of the same parties, according to the principle that *nihil tam naturale est, quæque eodem modo dissolvi quo colligata sunt*. The right acquired to the third person is then according to these authors, not irrevocable, because, being formed by the sole consent of the donor and donatary without the intervention of the third person, it is subject to be destroyed by the destruction of this consent, produced by an opposite consent of the same parties. The right only becomes irrevocable, when the death of the donor, rendering an opposite consent impossible, the consent by which the right was formed is no longer susceptible of being destroyed.

The contrary opinion has also its defenders. It is that of *Fachinæus*, *contr.* VIII. 89., and the doctors cited by him. The reasons by which they support their opinion are, that the clause of the act of donation which contains the charge imposed upon the donatary, includes a second donation, or a fidei-commissary donation by the donor to the third person. This second donation, without the intervention of the person in whose favour it is made, receives its full perfection by the first donatary accepting the donation subject to the charge, since by that acceptance he contracts, in favour of the third person without the intervention of the latter in the act, an engagement to accomplish the charge. From this engagement arises a right, which is acquired by the third person, to demand that the charge shall be accomplished; this right is irrevocable, and it shall not be in the power of the donor to discharge the first donatary in prejudice of the right acquired by the third person; for the clause which includes the second or fidei-commissary donation, making part of an act of donation *inter vivos*, the fidei-commissary donation included therein is of the same nature, and consequently is a *donatio inter vivos*, and consequently irrevocable. It ought then to be no longer in the power of the donor to revoke it, by discharging the first donatary from the charge imposed upon him, and from the engagement which he has contracted in favour of the second. With regard to the rules of law relied upon in support of the opposite opinion, *Quæque eodem modo dissolvuntur quo colligata sunt. Quæ consensu contrahuntur consensu dissolvuntur*; these rules only apply as between the contracting parties; and not in prejudice of any right acquired by

by a third person. This results from the last law *ff. de pact.*, which decides that the surety who has acquired a legal exception (*un droit de fin de non recevoir*) by an agreement between the creditor and the principal debtor, cannot be deprived of that right by an opposite agreement of the same parties (*a*).

This last sentiment is confirmed by the new ordinance of substitutions, *part 1. art. 11* and *12*. but the question, being only decided by this ordinance in respect to future dispositions, remains entire as to every thing which had previously taken place (*b*).

§ IV. *A Person may stipulate or promise by the Ministry of a third Person ; which is not stipulating or promising for another.*

[74] What has been hitherto said as to our only being able to stipulate or promise for ourselves and not for another, is to be understood as applying to contracts which we make in our own name ; but we may lend our ministry to another person, for whom we may contract, stipulate, or promise ; and in this case it is not we, properly speaking, who contract, but the other person who contracts by our ministry.

Thus, a tutor when he contracts in that quality, may stipulate and promise for his minor ; for it is the minor who is deemed to contract, stipulate and promise for himself by the ministry of his tutor ; the law giving a character to the tutor, which makes his acts be considered as those of his minor in all contracts relating to the administration of the tutelage.

It is the same with respect to a curator and every other legitimate administrator. It is the same with an attorney (*c*) (*procureur*) for the procuration (or power of attorney) which gives him the name of the person for whom he contracts, makes the person giving it be considered as contracting himself through the ministry of the attorney.

[75] If I contract myself in the name of a person who had not given me an authority, his ratification will in like manner make him be considered as having contracted himself by my

(*a*) Si reus postquam pactus sit *a se non peti pecuniam* (ideoque caput id pactum fidejussori quoque prodesse) pactus sit, *ut a se peti liceat*, an utilitas prioris pacti sublata sit fidejussori, quaesitum est. Sed verius est semel adquisitam fidejussori pacti exceptionem ulterius [ei] invito extorqueri non posse.

(*b*) I conceive it to be perfectly clear according to the law of *England* as a general proposition, that where a right is acquired to one person by the agreement of two others, such right cannot be afterwards defeated by the act of the parties originally contracting. In the particular case of the surety cited from the Digest, there can be no question but that such would be the decision.

(*c*) The word *Attorney* is here used in its most general sense, as a person acting in the place of another, and not in its more usual sense of a professional person-

ministry; for the ratification is equivalent to an authority, *ratihabitio mandato comparatur*.

If he does not ratify the agreement it is void as to him, but if I undertake for him, (*si je me suis fait fort pour lui*,) if I promise that he shall ratify it, this promise is an agreement which I make in my own name with the person with whom I contract, and by which I am in my own name obliged to obtain such ratification; and in default of my obtaining it, I am obliged to answer for his damages (a); that is to say, for every thing which he loses or is disappointed of gaining for want of ratification.

[76] In order to consider a person as contracting by the ministry of his tutor, curator, administrator, &c. it is requisite that the contract should not exceed the power of these persons. For instance, if a tutor, in his quality of tutor had, without the decree of a judge, sold an estate of his minor, the minor would not be deemed to have contracted by his ministry, and no obligation would ensue against him; the sale of estates being an act which is beyond the authority of a tutor.

So for a person to be considered as contracting by the ministry of his agent, the agent must have acted within the limits of his commission. If he has exceeded them, the person in whose name he contracts is not considered as having contracted by his ministry, unless he afterwards ratifies the contract.

[77] It is evident that a person exceeds the bounds of his authority, if the thing which he does differs from that which he is authorised to do, although it may be more advantageous. If I authorise a man to buy a particular piece of land at a limited price, and he purchases another more valuable at an inferior price, assuming to do so on my behalf; this, although more advantageous, will not be obligatory upon me, and I should not be considered as having made the purchase through his ministry, unless I was afterwards willing to ratify it. *L. 5. § 2. ff. mandat (b).*

[78] An agent also exceeds the limits of his commission when he does the act appointed, but upon terms less advantageous; as if being authorised by me to purchase at ten pounds, he engages for twenty, I should not be deemed to have contracted by his ministry, nor obliged by the contract, because he had exceeded the limits of his authority.

Nevertheless, if he offered to put me in the same situation which I should have been in if he had kept within his authority, as by in-

(a) The French writers always use the phrase of *damages and interests*.

(b) Si mandavero tibi ut domum Sejanam centum emeris, tuque Titianam emeris longe majoris pretii, centum tamen, aut etiam minoris; non videris impleisse mandatum.

demnifying me from the difference, I should be obliged to ratify it. *L. 3. § 2. & L. 4. ff. mandat (a).* It is clear that a person does not exceed the limits of his commission by contracting upon terms more advantageous than were prescribed. *L. 5. ff. l. 5. dict. tit. (b).*

[79] But the contract made by my agent in my name would be obligatory upon me if he did not exceed the power with which he was ostensibly invested; and I could not avail myself of having given him any secret instructions which he had not pursued. His deviation from these instructions might give me a right of action against himself, but could not exonerate me in respect of the third person with whom he had contracted conformably to his apparent authority; otherwise no one could be safe in contracting with the agent of an absent person (c).

[80] For the same reason, although the authority should be revoked, the person who had given it would be liable to another contracting with the agent without notice of the revocation.

[81] Likewise, although the commission terminates by the death of the person giving it, and there appears a repugnancy in supposing me to contract by the ministry of another, who after my death contracts in my name; yet if he contracts in my name after my death, but before it could be known at the place where

(a) Quod si pretium statui tuque pluri emisti, quidam negaverunt, te mandati habere actionem, etiam si paratus esses, id quod excedit remittere. Namque iniquum est, non esse mihi cum illo actionem, si nolit, illi vero si velit mecum esse. *l. 4.* Sed Proculus recte cum, usque ad pretium statutum actorum existimat; quæ sententia sane benignior est.

(b) *Melior autem causa mandantis fieri potest, si cum tibi mandassem ut Stichum decem aureis, tu cum minoris emeris, vel tantidem ut aliud quicquam servo accederet: utroque enim casu aut non ultra pretium, aut intra pretium fecisti.*

(c) This subject is accurately considered in the case of *Fenn and Harrison*, 3 T. R. 757. Where Mr. Justice *Asburs*, adverting to the difference between general and particular agents, said, that if a person keeping a livery stable directs his servant not to warrant a horse, and the servant, notwithstanding, does warrant him, the master is liable, because the servant was acting within the general scope of his authority, and the Public cannot be supposed cognizant of any private conversation between the master and the servant; but if the owner of a horse were to send a stranger to a fair, with express directions to the latter not to warrant him, and the latter acted contrary to the orders, the purchaser could only have recourse to the person who actually sold the horse; and the owner would not be liable on the warranty, because the servant was not acting within the scope of his employment. And Mr. Justice *Buller* said, that he agreed that there was a wide distinction between general and particular agents. If a person be appointed a general agent, as in the case of a factor for a merchant residing abroad, the principal is bound by his acts. But an agent constituted so for a particular purpose, and under a limited and circumscribed power, cannot bind the principal by any act in which he exceeds his authority; for that would be to say, that one man could bind another against his consent.

where the contract is made, such contract shall oblige my successor as if I had actually contracted by the ministry of this agent (a).

For this and the preceding decision we may deduce an argument from its being legally established, that a payment made to an agent is valid though after the death of a principal, or the revocation of the authority, if the death or revocation were not known. *L. 12. § 2. and L. 32. ff. de solut (b).*

[82] We contract through the ministry of another, not only when a person merely lends us his ministry by contracting in our name and not in his own, as when we contract by the ministry of a tutor, curator, agent, &c., in their quality as such. We are also deemed to contract by the ministry of another, though he contracts himself in his own name, when he contracts in relation to the affairs which we have committed to his management; for we are supposed to have adopted and approved, before hand, of all the contracts which he may make respecting the affairs committed to him; as if we had contracted ourselves, and are held to have acceded to all the obligations resulting therefrom.

Upon this principle is founded the *actio exercitoria*, which those who have contracted with the master of a ship for matters relative to the conduct of such ship, have against the proprietor who has appointed the master.

Upon the same principle is founded the *actio institoria*, which those who have contracted with the manager of a commercial concern, or a manufactory, have against the employer (*le commettant*); and the

The question in the immediate case was, whether a person employed to get cash for a bill, bound his principal by saying that he would indemnify a third person if he indorsed the bill; whilst it appeared that the authority was accompanied with an express declaration that the persons giving it would not indorse the bill, the majority of the Court of King's Bench were of opinion that they were not bound; but when it was found, upon further inquiry, that that was not the fact, and the direction was only general to get the bill discounted, the same judges held, that as the defendants had authorised the party employed to get the bill discounted without restraining his authority as to the mode of doing it, they were bound by his acts. 4 T. R. 177.

(a) I do not think this decision would be admitted by the courts in *England*. If the contract is enforced, it must be either as the act of the party deceased, or of his executor. The first supposition is absurd, and the other imputes to the executor an assent which he has not given; and which if he does give, induces a personal obligation against himself.

(b) *Sed et si quis mandaverit ut Titio solvam, deinde vetuerit eum accipere, solvam, liberabor; sed si sciero, non liberabor.*

Si servus peculiari nomine crediderit, eique debitor cum ignoraret dominum mortuum esse ante aditam hereditatem solverit, liberabitur. Idem juris erit et si manumisso servo debitor pecuniam solverit, cum ignoraret ei peculium concessum non esse. Neque intererit vivo an mortuo domino numerata sit; nam hoc quoque casu debitor liberabitur: sicut is qui jussus est a creditore pecuniam Titio solvere quamvis creditor mortuus fuerit, nihilominus recte Titio solvit, si modo ignoraverit creditorem mortuum esse.

actio utilis infortoria, which relates to contracts made with a manager of any other kind. These actions will be treated of *infra*, part 2. *ib.* 6. § 8. (a).

Observe, there is a difference between these managers and tutors, curators, syndics, &c. When these managers contract, they contract themselves and enter into a personal obligation. Their employers are only regarded as accessory to their contracts, and to the obligations resulting from them; whereas the others do not contract themselves, but only afford their ministry in contracting, and therefore do not oblige themselves but only those who contract by their ministry.

[83] We are also deemed to contract by the ministry of our partners, when they contract or are regarded as contracting for the affairs of the partnership: for, by entering into the partnership with them, and permitting them to transact the business of it, we are deemed to have adopted and approved beforehand of all the contracts which they may make for the affairs of the partnership, as if we had contracted jointly with them, and we have acceded beforehand to all the consequent obligations.

A partner is deemed to contract for the affairs of the partnership whenever he adds to his signature the words *and Company*, although afterwards the contract does not turn to the benefit of the partnership. For instance, if he borrows a sum of money, for which he gives a note with the words *and Company* added to his signature, although he has employed the money in his private affairs, or lost it at play; he is still deemed to have contracted for the affairs of the partnership, and consequently obliges his partners as having borrowed the money jointly with him, and as having contracted by his ministry. For his partners must take the consequence of having entered into their engagement with such a person; but those who contract with him ought not to be deceived and suffer by his want of fidelity.

The signature *and Company* does not however oblige my partners, if it appears by the very nature of the contract that it does not concern the affairs of the partnership; as if I put that signature to the lease belonging to myself and not to the company.

When the partner does not sign *and Company*, he is deemed to have only contracted for his own private affairs, and does not bind his partners, unless the creditor shews by other proof that he contracted in the name of the partnership, and that the contract actually related to the partnership affairs. (b).

(a) In *England*, the contracts here referred to may be treated as the immediate acts of the parties really concerned; and the employment of the person making the engagement is, in such case, merely matter of proof. The rule *qui facit per alium facit per se* is carried through.

(b) The last of these alone is requisite according to the law of *England*.

[84] Where a wife has a community of property with her husband, she is deemed, as to her share of the common property, to contract in conjunction with him, and by his ministry, in all the contracts made by him during the community (a).

ARTICLE VI.

Of the Effect of Contracts.

[85] Contracts produce obligations. The general effect of obligations will be considered infra ch. 2. At present we shall only take notice of a principle peculiar to contracts, and all other agreements.

This principle is, that a contract has no effect except with regard to things which are the object of the agreement, and to the contracting parties. *Animadvertendum est ne conventio, in aliâ re facta aut cum aliâ personâ, in aliâ re aliâve personâ noceat.* L. 27. § 4. ff. de pact.

[86] The reason of the first part of the principle is evident. The agreement, being formed by the intention of the contracting parties, can have no effect except with regard to what those parties intended and had in view.

We may adduce as an example of this first part of the principle, stipulations of separate property: when upon a marriage contract I bring a certain sum into the community, and stipulate that the remainder of my effects shall continue to be my own separate property; this agreement will not have the effect of excluding from the community the successions which may fall during the marriage, because it had no other object than to exclude the residue of what belonged to me at the time of the marriage (b). See other examples in l. 27. § 7. l. 47. § 1. l. 56. ff. de pact. et passim (c).

The

(a) The community of property between husband and wife, to which the allusions in this treatise are very frequent, is not analogous to the course of the *Eng'ish law*.

(b) It must be observed, that this illustration is independent of any question of construction, and supposes the intention to be ascertained. I think it is probable that upon the construction of an agreement, that a wife should have the separate disposal of her effects beyond a given portion, our courts would presume that the intention expressed in general terms was to comprize future effects.

(c) L. 27. § 7. Si generaliter mihi hominem debeas, et paciscar ne Stichum petam. Stichum quidem petendo, pacti exceptio mihi opponetur, alium autem hominem si petam, rectè agam.

L. 47. § 1. Lucius Titius Gaium Seium mensularium, cum quo rationem implicitam habebat propter accepta et data debitorem sibi constituit, et ab eo exstolam accepit in hæc verba: *Ex ratione mensæ, quam mecum habuisti in hunc diem ex contractibus pluribus remanse-*
runt

[87] The reason of the second part of the principle is not less evident ; the obligation which arises from agreements and the rights which result from them, being formed by the consent and concurrence of intention of the parties, they cannot oblige or give a right to a third person, whose intention did not concur in forming the agreement.

The 25th law, code *de pact.* furnishes an instance of this second part of our principle. I agree with my coheir that he shall take upon himself the whole of a certain debt due from the succession ; this agreement shall not hinder the creditor from demanding the debt of me, with respect to the part for which I am heir ; for the agreement can have no effect in relation to the creditor who was no party to it. *Debitorum pactionibus creditorum petitio nec tolli nec minui potest. Dist. loc.* We might adduce an infinity of other examples. It is no contradiction to this principle, that a partner may bind his associates ; a factor his principal ; a husband his wife ; for, as we have seen in the preceding article, these persons are considered as having themselves contracted by the ministry of the associate, the agent, or the husband.

[88] There might appear to be a stronger ground for opposing to our principle what is observed with respect to contracts *d'attermoiement*, by which a debtor, who declares himself incapable to satisfy his debts, makes an agreement with three-fourths of his creditors (the computation of which is made *non pro numero personarum, sed pro cumulo debiti*). The agreement, which contains terms of composition and a remission to the debtor, may be opposed to the other creditors, although they are no parties to the contract : and the debtor by a regular process may obtain a declaration, that the agreement shall extend to them, without prejudice to their hypothecations and privileges. Vide the ordinance of 1673, and l. 7. § 19. l. 8. l. 9. l. 10. ff. *de pact (a)*.

This

erat apud me ad mensam meam trecenta octoginta sex et usurae quae competerint ; summam auream quam apud me tacitam habes, refundam tibi si quod instrumentum ante emissum (id est scriptum) cujuscuque summae ex quacunque causa apud me remansit, vacuum et pro cancellato habebitur. Quaesitum est cum Lucius Titius ante hoc chirographum Seio nummulario mandaverat, uti patrono ejus trecenta redderet, an propter illa verba epistolae, quibus omnes conditiones ex quocunque contractu vacuae et pro cancellato ut haberentur ; captum est neque ipse neque filii ejus eo nomine conveniri possunt ? Respondi si tantum ratio accepti atque impensi esset computata, ceteras obligationes manere in sua causa.

L. 56. Si convenerit ne dominus à colono quid peteret et justa causa conventionis fuit ; nihilominus colonus à domino petere potest.

(a) L. 7. § 19. Hodie tamen ita demum pactio hujusmodi creditoribus obest, si convenerint in unum, et communi consensu declaraverint, quota parte debiti contenti sint ; si vero dissentiant, tunc praetoris partes necessariae sunt, qui decreto suo sequetur majoris partis voluntatem.

This is, however, not properly an exception to our principle, for it is not the agreement made with three fourths of the creditors which, *per se et propria virtute*, obliges the other creditors, who are not parties, to concur in the release. The agreement only serves to apprise the judge, that it is the common interest of the creditors, that it should be executed by all of them; the presumption being that so great a number would not concur in granting the release, unless it was for the common interest to do so, in order to obtain payment of the remainder; and as it is not just that the rigour of some creditors should prejudice the common interest of the whole, the judge decrees them to accede to the agreement, and to grant the release and the terms which it contains. But it is not the agreement, to which they are no parties, that induces this obligation; they are only obliged in consequence of the principles of equity; it being repugnant to equity, that by a rigour contrary to their own interest, they should prevent the general benefit of the creditors (a).

[89] Our principle, that agreements have no effect, except as between the contracting parties, is in some degree subject to an exception in the case of sureties; for the agreements, which take place between the creditors and the principal debtor, enure to the benefit of the sureties, although no parties to them, and give them the same rights against the creditor with the principal debtor. The reason whereof will be shewn *infra*, part. ii. ch. 6.

L. 8. Majorem esse partem, pro modo debiti, non pro numero personarum placuit. Quod si equales sint in cumulo debiti, tunc plurium numerus creditorum præferendus est. In numero autem pari creditorum, auctoritatem ejus sequetur prætor qui dignitate inter eos præcellit; sin autem omnia undique in unam æqualitatem concurrant, humanior sententia à prætore eligenda est.

L. 9. Si plures sint qui eandem actionem habent, unius loco habentur. Ut puta plures sunt rei stipulandi, vel plures argentarii, quorum nomina simul facta sunt unius loco numerabuntur quia unum debitum est. Et cum tutores pupilli creditoris plures convenissent; unius loco numerantur: quia unius pupilli nomine convenerant. Necnon et unus tutor plurium pupillorum nomine unum debitum prætendentium, si convenerit, placuit unius loco esse; nam difficile est, ut unus homo duorum vices sustineat; nam nec is qui plures actiones habet adversus eum, qui (unam) actionem habet plurium loco accipitur.

§ 1. Cumulum debiti et at plures summas referemus, si uni forte minutæ summæ centum aureorum debeantur, alii vero una summa aureorum quinquaginta; nam in hunc casum spectabimus summas plures; quia illæ excedunt in unam summam coadunitæ.

L. 10. relates to the manner of summoning the creditors.

(a) There is perhaps more subtilty than solidity in the distinction here taken. The provision referred to is a matter of positive law; creating an exception from a general principle, and though founded upon motives of equity, not necessarily resulting from mere equity without the aid of positive institution.

In respect to its immediate effect, the provision is analagous to the *English* law of a bankrupt being discharged by a certificate assented to by four fifths of his creditors, in number and value; but the analogy does not extend so far as to have any application to the general principle at present under discussion, for a certificate has not any similarity to an agreement.

It

[90] It is also in some degree subject to another exception with regard to substitutions contained in an act of donation inter vivos : for, upon the event on which they depend taking place, the parties called to the substitution, although no parties to the act, may demand from the donatary charged with the substitution the property which is included in it, as we have shewn in the preceding title, § 3.

A R T I C L E VII.

Rules for the Interpretation of Agreements (a).

[91] 1st Rule. We ought to examine what was the common intention of the contracting parties rather than the grammatical sense of the terms.

In conventionibus contrahentium voluntas potius quàm verba spectari placuit, l. 219. ff. de verb. signif.

There is an example of this rule in the law cited (b).

The following is another : You rent from me a small apartment in a house, the remainder of which is occupied by myself. I make you a new lease in these terms : “ I let A. B. my house for so many years, at the same rent which is mentioned in the former lease. Will you be allowed to insist that I have let you the whole house ? No ; for although the terms *my house*, in their grammatical sense, signify the whole house, and not a mere apartment, it is manifest that our intention was only to renew the lease of the apartment which you held under me, and that intention, of which there can be no doubt, ought to prevail over the terms of the lease (c).”

Rule

(a) Upon this subject *Pothier* only gives the general rules and illustrations thereof, which are afterwards stated. I have considered the importance of it as demanding a much more extensive discussion. The chapter of *Vattel* on the interpretation of treaties contains a very valuable exposition, which is equally applicable to the case of contracts. The chapter on the interpretation of agreements in *Mr. Powell's Treatise on Contracts*, the 5th chapter of *Shepherd's Touchstone*, and the 6th chapter b. 1. of the *Treatise of Equity*, with *Mr. Follenque's* notes, also contain much useful information upon this subject. See Appendix, N^o. V.

(b) Cum igitur ea lege fundum vectigalem municipes locaverint, ut ad heredem ejus, qui suscepit, pertineret ; jus heredum ad legatarium quoque transferri potuit.

(c) A case very similar to that supposed by *Pothier* occurred before the Court of King's Bench. A person demised amongst other premises a certain yard, under which there was a cellar, in the occupation of another tenant, and from the nature of the premises the cellar was ruled not to pass. *Doe d. Freeland v. Burt*, 1 T. R. 701.

Upon a life insurance, the person was warranted to be in good health, and it appeared that he was subject to the gout. Lord *Mansfield*, upon this being stated as an objection to the policy, said, the imperfection of language is such that we have not words for every different idea, and the real intention of the parties must be found out by the subject matter. Such a warranty can never mean that a man has not the seeds of disorder. We are all born with the

[92] Rule 2. When a clause is capable of two significations, it should be understood in that which will have some operation rather than that in which it will have none. *Quoties in stipulationibus ambigua oratio est, commodissimum est id accipi quo res de qua agitur in tuto sit, l. 80. de verb. Obl. (a).* As if in a partition between *Peter* and *Paul*, it is agreed that *Peter* shall have a way over *his land*: this in grammatical construction is applicable to his own land; but as in that sense it would be wholly nugatory, it must be construed to mean the land of *Paul* (b).

3d Rule,

seeds of mortality in us. A man subject to the gout is a lie capable of being insured, if he has no sickness to make it an unequal contract. *Park* 439.

A broker for a certain commission engaged to indemnify his principal from all loss occasioned by a resale of goods; the contract was held to be satisfied if the principal had a fair opportunity of disposing of them to a profit; and not to continue in force at all events till the goods should be resold, be the time when it might. *Curry v. Edson*, 3 T. R. 55. It was agreed in a lease that the landlord's son should have an option of taking the premises when he came of age, it was decided that that option should be made in a reasonable time, not that one party should have an option to rescind the agreement at any time, whilst the other should be perpetually bound by it. *Doe v. Smith*, 2 T. R. 435.

But regard must be had to the observations, in Appendix, No. V. respecting the bounds within which the application of this rule ought to be confined.

(a) Verba aliquod operari debent. Verba cum effectu sunt interpretanda. *Bacon*.

(b) Lord *Mansfield*, in the construction of a lease containing an ambiguous expression, said, "the first sense of the words used makes every thing consistent and effectual, the second sense destroys one half of the lease as repugnant and contradictory to the other; there ought to be no doubt therefore in which sense the words should be understood; a strained construction should not be made to overturn the lawful intent of the parties." *Wright v. Cartwright*, 1 Bur. 282. The objection which these observations were intended to repel, is of a nature so merely technical that none but a professional lawyer would comprehend the drift of it; and, as his lordship observed, the lease was so intelligible to every unlearned eye, that nobody doubted of the title for 60 years.

In case one construction of an instrument is conformable to the power and interest of a party, and another repugnant to it, or an act of forfeiture, the former will be preferred. Thus where a person having a power to lease in possession, but not in reversion, made a lease for so many years, from the day of the date, the word *from* being construed inclusively would support the lease and be conformable to his power, and exclusively would make it void. Lord *Mansfield* observed, in the same spirit as the preceding case, "One construction is to support the deeds of parties, give effect to their intention, and protect property; the other is a subtilty to overturn property and defeat the intention of the parties, without answering any one good end or purpose whatsoever. *From* may in vulgar use, and even in the strictest propriety of language, mean either inclusive or exclusive; the parties necessarily understood it in the sense which made their deed effectual; the courts of justice are to construe the words of parties so as to make their deeds effectual, and not to destroy them, more especially where the words themselves abstractedly taken will admit of either meaning." *Pugh v. Duke of Leeds*, Cowp. 714 *. And where the question was whether a

* The particular application of these principles has been strongly combated, as being repugnant to a series of express authorities. That circumstance, however, cannot affect the propriety of the observations, as stating the nature and spirit of a general rule.

[93] 3d Rule. Where the terms of a contract are capable of two significations we ought to understand them in the sense which is most agreeable to the nature of the contract. For instance, if it is said, that I let you an estate for nine years for the sum of 30*l.* *these terms, the sum of 30*l.** are not to be understood of one single sum, but of an annual rent to that amount, it being the nature of a lease that the price shall consist of an annual rent. It would be otherwise if it was evident that 30*l.* was the value of the farm,

as

writing amounted to a lease, or only to an agreement for a lease, it was ruled to be only an agreement ; because if it was held to be a lease a forfeiture would be incurred, whereas that would be contrary to the intention of the parties, who cautiously guarded against it, by the insertion of a covenant that a licence should be obtained from the lord. 2 T. R. 744.

Lord Coke has laid it down as a general rule, that “ where words may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law ; the intendment which standeth with law, shall be taken.” Co. Lit. 42. a. 6. 183. a. Upon a question whether the expressions of an agreement did or did not amount to an usurious contract, Lord Kenyon said, “ Without being inclined to strain the words either to involve the party in the crime of usury, or to exempt him from it, I am bound to read the whole, as any other person would do.” His opinion was, that the contract was usurious. Mr. Justice Butler, without adverting to the general principle, drew an opposite conclusion, which was also the conclusion of the other judges. Mr. Justice Ashburst said, if the court can by any reasonable construction consider this not to be usury they are bound to do so : and I think we are not necessarily to put the construction on this agreement that would make it usurious. Mr. Justice Grose, “ If we can put a legal construction on this agreement we are bound to do so ; then the question is, whether it will not fairly bear this construction. I think it will.

The following passage in the Treatise of Equity, with Mr. Fenblanque's note thereon, are materially applicable to the present subject.

“ Where words, if taken literally, are likely to bear none or a very absurd signification, to avoid such an inconvenience we may deviate from the received sense of them ; for the agreement of the parties is the only thing which the law regards in contracts : and it is a known rule, that a man's act shall not be void if it may be good to any intent ; for every conveyance is made for some purpose, so that for necessity, *ne res pereat*, where there is no other way of satisfying the will and the intent, the words may be taken in the most extensive and improper sense, B. I. c. 6. § 18. If an absurdity would result from strictly pursuing the expression of the instrument, courts of law will, equally with courts of equity, set about to discover the mean by which the real intent will receive effect, notwithstanding the untechnical language in which such intent is expressed. For though an interpretation or construction ought not to be admitted against the letter of a deed, yet in some cases a strained and secondary interpretation may be admitted ; and if the letter will bear a second and less genuine interpretation, it may be admitted *ne detur absurdum* ; but where the intention of the parties is not clear and plain, but in *equilibrio*, in such case a secondary and strained construction shall not be made, but the words shall receive their more natural and proper construction ” Per Bridgman C. J. Earl of Bath's case, Carter's Rep. 108, 109. This distinction is agreeable to the rule, *benignæ faciendæ interpretationes iustarum propter simplicitatem laicorum ut res magis valeat quam pereat*, Co. Lit. 36. 183. a. which rule is allowed to controul the application of every other rule of construction, *nam legis constructio non facit injuriam*. But though a deed may in some cases be expounded contrary to the strict import of its letter, yet this liberty of construction does not extend so as to make a deed, but merely to avoid some extremity which might ensue from a literal and strict construction of it. *Check v. Lisle*, Rep. temp. Fmch. 101. The same general doctrines are stated by Lord Ch. Willes as follows : Whenever it is necessary to give an opi-

as if the former leases had been for two or three pounds a-year. If it is said that I let you an estate for 30*l.* a-year and repairs, these repairs are to be understood to be those which belong to the tenant, according to the nature of the contract (a).

[94] 4th Rule. Any thing, which may appear ambiguous in the terms of a contract, may be explained by the common use of those terms in the country where it is made. *Semper in stipulationibus & in ceteris contractibus id sequimur quod actum est, aut si non appareat quod actum est, erit consequens, ut id sequamur quod in regione in qua actum est frequentatur, l. 34. ff. de reg. juris.*

According to this rule, if I agree with a person at a certain sum *per annum*, to cultivate my vineyard, without expressing the quantity of labour to be employed, we are supposed to mean that there shall be such a quantity as agrees with the custom of the country (b).

[95] 5th Rule. Usage is of so much authority in the interpretation of agreements, that a contract is understood to contain the customary clauses although they are not expressed; *in contractibus tacite veniunt ea quæ sunt moris et consuetudinis.*

nion upon the doubtful words of a deed, the first thing we ought to inquire into is, what was the intention of the parties. If the intent be as doubtful as the words, it will be of no assistance at all; but if the intent of the parties be plain and clear, we ought if possible to put such a construction on the doubtful words of a deed as will best answer the intention of the parties, and reject that construction which manifestly tends to overturn and destroy it. I admit, that though the intent of the parties be never so clear, it cannot take place contrary to the rules of law; nor can we put words in a deed which are not there, nor put a construction on the words of a deed directly contrary to the plain sense of them. But where the intent is plain and manifest, and the words doubtful and obscure; it is the duty of the judges to endeavour to find out such a meaning in the words as will best answer the intent of the parties. *Parkhurst v. Smith, Willes, 132.*

(a) There is an old case upon this point, where a lease of a manor in which there were divers copyholds, had a condition that the lessee should not molest, vex, or put out any copyholder upon pain of forfeiture, and the lessee entered into a cow-house, which was part of the premises, and beat a copyholder. It was held this was no breach of the condition, not being a molestation respecting his copyhold tenement. *Penn v. Glover, Cro. Eliz. 427.* There is an authority still more ancient, that if I grant a man common out of all my manor, he may not by virtue of such a grant have common for any beasts but such as are commonable, or take it in my garden, but only in commonable places. 9 H. 6. 35. *Fines Common* 61. 12 H. 8. 2. If a vessel is warranted to depart with convoy, it implies convoy for the voyage according to the nature of the trade, and not such as might be designed to separate from the ship in a minute or two. *Lilly v. Ewer, Doug. 72.*

(b) A pack of wool in *Yorkshire* and in *Wiltshire* may perhaps differ in weight, and the word would be construed to apply to the one weight or to the other, according to the place where it was made. But if a particular measure is positively established by law, with a prohibition of using any other, as is the case with respect to corn, that measure will be understood notwithstanding any local usage to the contrary. *Master, &c. of St. Cross v. Lord Howard de Walden, 6 T. R. 343.*

For instance, in a contract for the lease of a house, though it is not expressed that the rent shall be paid half-yearly at the two usual feasts, and that the tenant shall do such repairs as are usually done by tenants; these clauses are understood.

So in a contract of sale, although the clause that the seller shall be bound to warrant and defend the purchaser from evictions, is not expressed, it will be understood (a).

[96] 6th Rule. We ought to interpret one clause by the others contained in the same act, whether they precede or follow it (b).

The law 126. *ff. de verb. signif.*, furnishes an example of this rule. It was expressed in a contract of sale by one clause, that the estate should be sold *uti optimus maximus*, that is to say *free from incumbrances*; by a second clause it was said, that the vendor should not be understood to warrant the estate except as to his own acts; this second clause serves for the interpretation of the first, and restrains the generality of the terms to this sense, that the vendor by the first clause shall not be understood to promise and assure any thing more than that he had not himself incumbered the estate, but not to undertake that it was free from all incumbrances charged by his predecessors, and of which he had no knowledge (c).

7th Rule.

(a) Any thing, which is of the nature of the contract, is of course understood without being expressed; and where there is a special local custom (as for a tenant who has left a farm to reap the crop which he sowed. *Wigglesworth v. Dullison*, Doug. 201.), that may be of the same effect as if it was included in the general nature of the contract. Also where a contract is merely preparatory to another, the insertion of customary clauses in such other will be implied as forming part of the first. But where a contract is perfect and complete, I do not conceive that any clauses not falling within the above principle, would be implied however usual they might be; but the usual mode would be a very proper ground for determining the sense of an ambiguous expression. Of which *vi.* an instance in n. to No. [96] post.

(b) *Ex antecedentibus et consequentibus est optima interpretatio, nam turpis est pars quæ cum suo toto non convenit. Plowd. 160.*

(c) *Si cum fundum tibi darem, legam ita dixi uti optimus maximusque esset, et adjectum jus fundi deterius factum non esse per dominum, præstabitur, amplius eo præstabitur nihil: etiam si prior pars qua scriptum est, uti optimus maximus-que sit, liberum esse significat, eoque si posterior pars adjecta non esset, liberum præstare deberem; tamen inferiore parte satis me liberatum puto, quod ad jura attinet ne quid aliud præstare debeam, quam jus fundi per dominum deterius factum non esse.* A recent case before the Court of Common Pleas introduced a question very nearly similar to that in the preceding law, and involving the discussion of the same general question; but the instance was less strong, as the restrictive terms might admit a grammatical connection with the general covenant. The seller of an estate warranted it against himself and his heirs, and covenanted that he, notwithstanding any thing by him done to the contrary, was seized in fee, AND THAT he had good right to convey, that he would set out a way, that the purchaser should enjoy without interruption from the seller or any person claiming under him, that the seller and all persons claiming under him would make further assurances. It was contended that the covenant, that the seller had good right to convey was general and not restrained to his own acts; but the contrary was decided. A considerable part of the judgment turned upon the general nature of the subject, (a very important ground of construction), and the critical examination of the words.

[97] 7th Rule. In case of doubt, a clause ought to be interpreted against the person who stipulates any thing, and in discharge of the person who contracts the obligation.

In stipulationibus cum queritur qui actum sit, verba contra stipulatorem interpretanda sunt. L. 38. § 18. ff. de verb. Obl.

Fere secundum promissorem interpretamur. L. 99. ff. dict. tit.

For instance, if it was said in a lease that the tenant should deliver to the landlord at a certain time a certain quantity of corn by way of yearly rent, without saying where the delivery should be made, it should be understood to be at the house of the tenant; for that sense is most in favour of the person who contracts the obligation. If the landlord intends that the corn shall be delivered at his own granary, he should take care to have it expressed (a).

8th Rule.

words. In the course of his opinion, and apparently as a principal ground of it, Lord Ch. Justice *Eldon* said, The intent of the parties to the covenant is to be collected from the warranty, from the other covenants, and from the *prima facie* nature of a purchase of a freehold estate.—Mr. Justice *Buller*. In the construction of agreements and covenants the intention of the parties is principally to be attended to. In a conveyance of this sort, the usage of the profession also deserves considerable attention. We do not do justice to the parties unless we look to the whole deed, and infer from that their real intention.—Mr. Justice *Heath*. “The purchaser might have entertained suspicions of the title, and might therefore have required a general covenant. But in order to ascertain whether he did so, we must examine the other parts of the deed, and the other parts of the deed negative that idea. The second clause is consequential to the first.” *Brownrig v. Wright*, 2 B. & P. 13.—This case is in several respects very instructive, and furnishes an illustration of many of the other rules of interpretation which are considered in the text. In a prior case cited and relied upon in the preceding, two lessees of a colliery, “jointly and severally covenanted in the manner following, that is to say.” After some particular covenants there was a covenant on the part of the lessor, and a proviso admitting a particular mode accounting with the lessor, *it was agreed that certain monies should be accounted for by the said G. E. and J. W.* It was ruled that this last was a joint and several covenant. Mr. Justice *Asbursft* said, The first words must, according the general rules of construction, extend to all the subsequent covenants on the part of the lessees throughout the deed, unless there was something in the nature of the subject to restrain them.—Mr. Justice *Buller*. “It is immaterial in what part of a deed any covenant is inserted; for in construing a deed, we must take the whole deed into consideration, in order to discover the meaning of the parties.” *D. of Northumberland v. Errington*, 5 T. R. 522. This principle also extends in some degree to several different instruments which are executed for one common purpose, and which are considered as the several parts of one assurance.

(a) The rule of the *English* law is directly the reverse, and the words of an engagement are to be construed most strongly against the person engaging.

These two opposite rules have probably both resulted from the same maxim, that *verba ambigua fortius accipiuntur contra proferentem*. By the *Roman* law, the words of the stipulation were necessarily those of the person to whom the promise was made; the person promising, only assented to the question proposed by the person stipulating. There is nothing similar to this in the covenants and engagements used in *England*; but an indenture is the deed of both parties and the words it contains are taken as the words of both, except as to those parts which are in their nature only applicable to one of them.

In the case of *Brownrig v. Wright* cited in the last note, Lord *Eldon* said it is certainly true

[98] 8th Rule. However general the terms may be in which an agreement is conceived, it only comprises those things respecting which it appears, that the contracting parties proposed to contract, and not others which they never thought of. *Iniquum est perimi pacto id de quo non cogitatum est. L. 9 § fin. ff. de transac.*

According to this rule, if we had agreed upon a compromise concerning our respective pretensions, and had fixed upon a sum which you engaged to pay me, whereby we should be mutually discharged from the demands of each other; this compromise could not prejudice the rights which I had against you, and of which I could not have any knowledge at the time of making it. *His tantum transactio obest de quibus actum probatur: non porrigitur ad ea quorum actiones competere postea compertum est. d. l. 9. § fin.*

For instance, if a legatee compounds with the heir for all his rights arising from the testament of the deceased, he will not be excluded from his demand of another legacy given by a codicil which does not appear till afterwards. *L. 3. § 1. l. 12. ff. de transf. (a).*

[99] 9th Rule. When the object of the agreement is universally to include every thing of a given nature, (*une universalité des choses*) the general description will comprize all particular articles, although they may not have been in the knowledge of the parties. We may state as an example of this rule an engagement which I make with you to abandon my share in a succession for a certain sum. This agreement includes every thing

true that the words of a covenant are to be taken most strongly against the covenantor; but that must be qualified by the observation, that a due regard must be paid to the intention of the parties as collected from the whole context of the instrument.

Lord Bacon, in commenting upon the general maxim, says, "it is to be noted that this is the last rule to be resorted to, and is never to be relied upon but where all other rules of exposition of words fail, and if any other rule come in place, this giveth place;" and adds, "that it is a point worthy to be observed generally of the rules of law, that when they encounter and cross one another, that he understood which the law holds to be worthier and to be preferred; and it is in this particular very notable to consider, that this being a rule of some strictness and rigour, doth not as it were its office but in the absence of other rules which are of some equity and humanity."

In modern determinations, words, whether used in contracts or on other occasions, seem not so much to be construed upon the ground of an interpretation favourable or adverse as they formerly were. Rules of rigid and favourable construction, were formerly resorted to as a primary source of interpretation. The more reasonable practice is to give to language its true effect, according to the intention of the speaker or writer, as inferred from the whole expressions, and the nature of the occasion to which it is applied.

(a) Cum transactio propter fidei commissum facta esset et postea codicilli reperti sunt; quæro an quanto minus ex transactione consecuta mater defuncta fuerit quam pro parte sua est, id ex fidei commissi causa consequi debeat? Respondit debere. l. 12. Non est sciendus qui generaliter in his quæ testamento sibi relicta sunt, transegeret; si postea causetur de eo sole cogitasse quod prima parte testamenti, ac non etiam quod posteriore legatum sit. Si tamen

thing which makes part of the succession whether known or not; our intention was to contract for the whole. Therefore it is decided that I cannot object to the agreement, under pretence that a considerable property has been found to belong to the succession of which we had not any knowledge. *Sub pretextu specierum post repertarum, generali transactione finita rescindi prohibent jura, l. 29. cod. de transf. (a).*

It is however implied that the property has not been purposely concealed from me by my coheir, for that is a fraud which gives me a right to invalidate the agreement; wherefore it is said in the same law, *Error circa proprietatem rei apud alium extra personas transfigentium, tempore transactionis constituta, nihil potest nocere (b).*

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tamen postea codicilli proferuntur; non improbe mihi dicturus videtur, de eo duntaxat se cogitasse, quo illarum tubularum, quas tunc noverat, scriptura continetur.

To this principle may be referred the decisions before adverted to, of disturbing a copyholder, and of granting a right of common; and the common covenants that a person shall enjoy an estate without the hinderance or interruption of any person whatever, which are held to comprise only hindrances and interruptions by persons bearing lawful titles, and not the mere trespasses of a stranger, or the public acts of the government.

Also where a person had a paternal estate which was under a settlement in *Limerick*, being intitled to dispose of the ultimate reversion on failure of issue, and had other estates in *Mayke* and *Roscommon*, and made a voluntary settlement of his estates in *Mayke* and *Roscommon*, and the deeds, after a very particular description of his lands in these counties, added, *and all his other estates in Ireland*, the limitations of the later settlement being for the most part inapplicable to his paternal estate. It was said, "it is very common to put in a sweeping clause, and the use and object of it in general, is to guard against any accidental omission, but in such cases, it is meant to refer to estates or things of the same nature and description with those which have been already mentioned." *Moore v. Magreth. Cowp. 9.*

(a) Where it appeared to be the intention of a lady to settle all her property previous to marriage, and deeds were made settling her property in A, B, C, and elsewhere, it was decided that a remote reversion was included, though not expressly mentioned or particularly thought of, as the general words were sufficient to include it, and the intention of the parties was to settle all. *Freeman v. Duke of Chandos. Cowp. 360.*

(b) In the case of *Corking v. Pratt, 1 Ves. 400.* An agreement by a daughter to receive from her mother a certain sum, in lieu of her share of the father's estate, was set aside, the value of the share appearing to be considerably more. The Master of the Rolls said, "the question is what was in view on each side; the daughter clearly did not intend to take less than what by law she was entitled to; though what that was did not clearly appear to her, but then she thought what was stipulated for her was her full share. Though there is no very great evidence of undue influence, yet the Court will always look with a jealous eye upon a transaction between a parent and a child, and interpose if any undue advantage is taken. The mother plainly knew more than the daughter, and only says in general she believes, she conceals nothing from her. But there is another foundation to interpose; viz. that it appeared the personal estate amounted to more, and the party suffering will not be permitted here to avail himself of that want of knowledge, nor indeed in the case of a trifle, but some bounds must be set to it." I have thought it proper to insert this case here, although it has not any immediate relation to the rules of interpretation, there being no dispute about the construction of the agreement. It does not appear whether the Court proceeded upon each of the grounds of undue influence and inferior value as separately sufficient or merely upon their combination. In respect

The rule being only founded upon the presumption, that the parties who treat upon the universality of a subject, intend to treat upon all the particulars which compose it, whether known to them or not, is subject to an exception. When it appears on the contrary, that the parties only intended to treat of that universality of which they had a knowledge, as if they treated with reference to an inventory; for instance, if by an instrument between my coheir and myself it is said, that I give up to him, for a certain sum, my share of the moveables *comprized in the inventory, or according to the inventory*, it is clear in this case, that our intention was to treat of what was comprized in the inventory, and not of what was omitted and had not come to our knowledge (a).

[100] 10th Rule. When a case is expressed in a contract on account of any doubt which there may be whether the engagement resulting from the contract would extend to such

spect to the former there does not appear a sufficient foundation in fact, and in respect to the latter, it was evidently the intention of the parties to make an agreement in some degree aleatory, by which the gains or loss upon the specific account should be transferred from the daughter to the mother, the former having a certain definite compensation. The accidental benefit of the result (taking the case to be free from the imputation of fraud) ought not to vary the effect of the agreement, as it was a probable contingency in the contemplation of the parties. In case the succession had fallen short would the agreement have been set aside in favour of the mother?

(a) The author of the treatise of Equity observes, *b. 1. c. vi. §. 16*. That the matter which he is about is always supposed to be in the mind of the speaker, although his words seem to be of a larger extent, as general words in a release of all demands, or the like shall be restrained by the particular occasion, and shall be intended only of all demands concerning the thing released. Mr. *Fenblague*, in his commentary on this passage says. "Where the purpose is distinctly recited in the instrument, inconvenience will rarely result from the general words of the contract, &c. receiving such construction will confine their operation to the declared purpose of the parties. *Sensus verborum ex causa dicentis accipiendus est, et sermones accipiendi sunt secundum subjectam materiam, 4 Rep. 136*. But where the purpose or object of the instrument is not distinctly recited, but is to be collected from the substance of the instrument, great caution is necessary in allowing the general expression to be controlled, upon the notion of its exceeding the particular purpose supposed to have been in the contemplation of the parties. In *Thorpe v. Thorpe, 1. Raym. 235*. the Court thus stated the distinction. "Where there are only general words in a release, they shall be taken most strongly against the releasor, as where a release is made to A, and B. of all actions; it releases all several actions which the releasor has against them as well as all joint actions, so if an executor releases all actions it will extend to all actions that he hath in both rights, 2. *Roll. Abr. 409*. but where there is a particular recital in a deed, and the general words follow, the general words shall be qualified by the special words. See also *Lord Arlington v. Myrick. 2. Saunders 414*. But though this distinction may be generally true, yet there certainly are cases in which it has not been strictly regarded, exclusive of those cases in which, if the general words had been allowed to prevail in their whole extent, an absurdity or manifest injustice would have ensued. See *Porter v. Phillips. Palm. 218. Cro. Jac. 623. Tisdale v. Essex, Hob. 34. & Hos's case, 5. Rep. 70. b.* in which case some material distinctions are stated. Several cases, in which the above distinction has not been allowed to take prevail, are cited by Lord *Baron* in his maxims as illustrative of the rule. "Verba generalia restringuntur ad habilitatem rei vel personæ." case,

case, the parties are not thereby understood to restrain the extent which the engagement has of right, in respect to all cases not expressed.

Quæ dubitationis tollendæ causa, contractibus inferuntur jus commune non lædunt, l. 81. ff. de reg. juris. l. 56. mandat.

See an example of this rule in the said law 56, from which it is taken (a).

The following is another. If it is said in a contract of marriage, that the intended husband and wife shall be in community of property, which community shall comprize the moveable property that may fall to either of them; this clause does not prevent all other things from forming a part of the community which would do so of common right; being only inserted on account of the doubt which the parties from want of legal information might entertain, whether moveables would form a part of the common property (b).

[101] 11th Rule. In contracts as well as in testaments, a clause conceived in the plural may be frequently distributed into several particular clauses.

(a) *Qui mutuam pecuniam dari mandavit, omisso reo promittendi, et pignoribus non distractis, eligi potest, quod uti liceat si literis exprimatur, distractis quoque pignoribus ad eum creditor redire potest.*

(b) To add an illustration from the *English* law. A clause in a lease that the tenant shall not cut any oaks or elms, will not authorize his committing waste by cutting any other timber. In the annuity act, (and acts of parliament have in this respect the same construction with private instruments), there is a declaration that it shall not extend to annuities given by will or marriage settlement. It was argued that this would be nugatory if the general expressions of the act were only to be confined to pecuniary transactions. But Lord *Kenyon* said, it seemed to him that the anxiety of some members induced them to insert the last clause, after the act was drawn, but he did not think that the first section could ever have been extended to cases mentioned in the last, if they had not been excepted. *Crespigny v. Winterneon*, 4. T. R. 790.

But it frequently becomes a material question, whether particular clauses or expressions are introduced from the abundance of caution, in order to obviate a particular doubt which might possibly arise, or are to be considered as a complete explanation of the intention of the parties respecting the subject, and it is not an unusual or unimportant argument, that if the whole of any class of objects was intended to be comprized, the mention of particular individuals was unnecessary and absurd. The fair principle appears to be, that, whatever is incidental to the nature of the transaction shall prevail, notwithstanding a particular stipulation of what that incident would generally comprize, but any arguments of mere general implication shall not prevail when the matter is defined by particular expressions. This principle is certainly open to some exceptions, and may be attended with some degree of difficulty in the application, but questions of construction depend very much upon the particular circumstances of the immediate case, and one case will furnish less immediate analogy for the exposition of another, than in almost any other department of the law. The several particular rules which have been mentioned are rather illustrations of the great and leading principle, that the intention of the parties as expressed or implied is the law of construction. They point out the reasonable grounds of inference and may be more properly considered as the aids and instruments of ratiocination than as the authoritative rules of law.

For instance, if by a contract of donation which I make to *Peter and Paul* my domestics, of a certain estate, it is said, "*Subject to the charge that after their death without children, it shall be restored to the donor or his family.*" This clause conceived in the plural should be distributed into these two singular clauses. *Subject to the charge that upon the death of Peter without children his share shall be restored, &c.* and in like manner, subject to the charge that upon the death of *Paul, &c.* *Arg. l. 78. l. 7. ff. ad. sen. Trebell. (a).*

[102] 12th Rule. What is at the end of a phrase commonly refers to the whole phrase, and not only to what immediately precedes it, provided it agrees in gender and number with the whole phrase. (b)

For instance, if in the contract for sale of a farm, it is said to be sold with all the corn, small grains, fruits and wine *that have* been got this year, the terms, *that HAVE been got this year* refer to the whole phrase and not only to the wine, and consequently the old corn is not less excepted than the old wine; it would be otherwise if it had been said, all the wine that *has* been got this year, for the expression is in the singular and only refers to the wine and not to the rest of the phrase, with which it does not agree in number.

ARTICLE VIII.

Of the Oath which the Contracting Parties sometimes add to their Agreements.

[103] The contracting parties sometimes make use of an oath, for the further assurance of their accomplishing the engagements which they contract.

The oath in question is a religious act, by which a person declares that he submits to the vengeance of God; or, that he renounces his mercy, if he does not accomplish his promise which

(a) Gaius Seio ex semisse, Titia ex quadrante et aliis ex reliquis portionibus heredibus institutis, ita cavit *Fidei autem vestrae mando Gai Seie et Lucia Titia uti post obitum vestrum vultatis restituatis Titio et Sempronio semissem patrimonii et portionis ejus quam vobis dedi.* Quæsitum est cum utrique adierint hereditatem et postea Gaius Seius defunctus sit, Lucia Titia hærede institutâ, an hæc Lucia Titia partem dimidiam semissis, quam rogatus erat Gaius Seius restituere protinus debeat; an vero post suam demum mortem, universum fidei-commissum tam ex suâ personâ quem ex Gaii Seii datum restituere debeat? Respondit Luciam Titiam statim teneri, ut partem dimidiam semissis ex persona Seii restituat.

(b) A rule nearly according with the above is laid down by Mr. Justice Heath, in the case of *Brownrig v. Wright*, referred to *supra*. No. 96. That where any sentence contains distinct covenants, and there are words of restriction either in the prefatory or concluding part, those words must be extended to every part of the sentence, unless the intention of the parties appears to require an opposite construction.

results from these forms. "So may God preserve, or help me, I wish that God may punish me if I fail in my word, &c."

[104] The pretensions of the churchmen formerly rendered the use of an oath very common in all contracts; they pretended that the cognizance of all contests respecting the execution of contracts which were confirmed by an oath belonged to the ecclesiastical judge, because an oath being an act of religion, and the refusal to execute an obligation confirmed by an oath, being a violation of the sanctity of the oath, the interests of religion were concerned in contests respecting the execution of these engagements; and therefore ought to bring these under the authority of the ecclesiastical judge.

On this account the notaries who were churchmen, in order to secure to the ecclesiastical judge the cognizance of the contracts which they passed, did not fail to insert in the contracts, that the parties had made oath not to contravene any clause of the contract, but would execute it faithfully.

The ecclesiastics have for a long time been obliged to abandon these pretensions to which ignorance gave rise, and the use of oaths in contracts of private individuals is discontinued; nevertheless as it sometimes happens, that persons bind themselves by an oath for the accomplishment of their promises, it will not be improper cursorily to examine the effect of such an oath.

[105] An oath of this kind has little or no effect in point of law, (*dans le for exterieur*) for the obligation is valid in itself or it is not: if it is valid in itself the oath is superfluous, since without its intervention, the creditor in whose favour the obligation is contracted has an action against his debtor for the performance of it, the oath adds nothing to this action and gives no more right to the creditor than he would otherwise have had.

When the obligation is not valid in point of law, and is one to which it has been deemed proper to deny a right of action, the oath is likewise of no legal effect, for the right of action is notwithstanding still denied.

For instance, a tavern keeper is equally barred from enforcing against persons resident in the same town, a demand for expences incurred at his tavern: a gamester is precluded from enforcing the payment of money lost at play, although in either case the debtor has entered into an obligation upon oath to pay. — The reason is that the oath being an accessory of the engagement, the law which holds the engagement to be a nullity, must consequently hold the oath to be so likewise according to the rule, *quum principalis causa non consistit, nec ea quidem quae sequuntur locum habent*. L. 129. § 1. ff. de reg. juris.

Besides

Besides, it ought not to depend upon private individuals by interposing an oath to render those engagements valid, which the law has deemed it proper to reprove, and thus to elude the authority of the law.

[106] According to the *Roman* law, an oath made by one of the parties to perform the agreement, had no effect when the agreement itself was void, on account of any illegality in the object of it, *l. 7. § 16. ff. de pact. (a)* or on account of any violence. *Sacr. pub. cod. si adv. vend. (b)* But when the agreement was only subject to be impeached on account of the minority of one of the contracting parties, the oath of the minor precluded his impeaching it. This was decided by *Alexander Severus*, in the case of the sale of an estate made by a minor; who had engaged to the purchaser not to contravene the contract; *nec perfide*, answers the emperor, *nec perjurii me auctorem tibi futurum sperare debuisti. l. 1. Cod. si adv. vend."*

Antony in treating upon this law, teaches us that the decision of it is not adopted in *France*. The reason is that the laws for the succour of minors would be always eluded, it being easy for those who contract with them to interpose an oath. The custom of *Brittany* decides formally, art. 471. that the contracts of minors are not rendered valid by their oath.

It is principally in point of conscience, (*dans le for de la conscience*), that an oath by which a person engages himself to the accomplishment of his promise can have any effect. It may render the obligation more strict, and the party contravening it more culpable; for a person who after having engaged with an oath voluntarily fails in the execution of his engagement, adds to the infidelity of every wilful contravention of an engagement, the crime of perjury.

[107] The oath is attended with this effect, at least *in foro conscientie*, when the engagement is valid in itself. But supposing the engagement to be void even *in foro conscientie*, is the oath for the performance of it void likewise? we shall examine this by running over the different vices by which engagements may be rendered null.

If the engagement is a nullity in respect of the object of it; for instance, if a person engages to give a thing which cannot be the

(a) Quotiens pactum a jure communi remotum est, servari hoc non oportet: nec legari: nec iurjurandum de hoc adductum, ne quis agat, servandum, Marcellus lib. secundo Digestorum scribit.

(b) Sacramenta puberum sponte facta super contractibus rerum suarum non retractandis inviolabiliter custodiantur. Per vim autem, vel per justum metum extorta etiam a maioribus (maxime ne querimoniam malefactorum commissorum faciant), nullius esse momenti jubemus.

object of a contract, (*qui est hors du commerce*), or to do something which is impossible, it is evident that the oath cannot be obligatory, or have any effect.

It is also universally agreed, that an oath to accomplish an illicit engagement is not obligatory; that it is sinful to take the oath, and doubly so to accomplish it. In this case *scelus est fides*.

This decision applies not only when the thing is illicit by the law of nature, but even when it is so by positive law, for we are obliged in point of conscience to pay obedience to the law, and taking an oath cannot dispense with this obligation.

When an agreement is void on account of error, the oath which accompanies it is so likewise; for the agreement being absolutely void, there is no engagement which the oath can confirm.

[108] There is some difficulty with respect to an engagement void on account of force. *Grotius* agrees, that a promise extorted by unjust violence does not oblige the person making it to its performance, because even admitting such a promise might produce an obligation, which would give the person in whose favour it was made a right against me, he would be bound on his part to acquit me from it in reparation of his unjust violence, but when such promise is confirmed by an oath, although the oath is not less extorted than the promise, *Grotius* thinks that I am in conscience bound to perform it, because if, for the reasons already mentioned, I am not so bound to the person in whose favour it is made, I am obliged to God, to whom I am deemed to have made a promise by the oath which I have taken, and therefore if I do not accomplish this promise, having it in my power to do so, I am guilty of perjury. *Grot. lib. 2. A. 3. n. 14.*

The same author observes, that the heir of the person taking such an oath, is not subject to the obligation which results from it, because my heir who succeeds to my civil character, and represents me as a member of society, succeeds to my obligations contracted in favour of other persons in the commerce of civil society, but does not succeed to my obligations towards God. *Ibid. N°. 17.*

[109] *St. Thomas*, 11. 2. 989. art. 7, also thinks that a promise, though accompanied by an oath, was not obligatory, in regard to the person who had extorted it by an unjust violence, but that it was so in the eye of God and in point of conscience; that this obligation was not founded upon any vow or promise, but upon the respect due to the sacred name of God, which is violated when we do not accomplish what we promise thereby.

He however allows the qualification, that after I have satisfied my oath by paying what I had been forced to promise with an oath,

oath, I may proceed at law for the repetition of it, if I can prove the violence which has been offered to me.

This qualification is attended with difficulty; for can a mere form of payment (*dicis causa*), with the intention of reclaiming what is so paid, be called a payment and a satisfaction of an oath? Therefore *Grotius* refutes this sentiment, *probare non possum* (says he) *quod a quibusdam traditum est eum qui prædoni quicquam, promiserit, momentanea solutione posse defungi; ita ut liceat quod solvit recuperare; verba enim juramenti quoad Deum simplicissime, et cum effectu sunt accipienda.* D. cap. 13. n. 15.

[110] The Popes have also decided, that a promise, accompanied by an oath, although extorted by an unjust violence, was obligatory towards God: this is the decision of *Alexander III.* upon ch. 8. *extra de jurejur.* *Celestin. III.* ch. 15. *d. l.* says, that the Popes, when they give absolution for the violation of an oath, do not intend to encourage those who have taken such oaths to violate them, but only to shew an indulgence for such violation, which ought to be treated with the tenderness due to venial transgressions, and not punished with the rigour which belongs to mortal sins. *Non eis dicatur ut juramenta non serven', sed si non ea attenderint non ob hoc tanquam pro mortali causa puniendi.*

[111] *Puffendorf* IV. 2. 8. thinks, on the contrary, that a promise extorted by violence, though confirmed by an oath, is not more obligatory before God than before man. His reasons are, 1st. That such an oath, when it is addressed to the person to whom I promise any thing, is only a solemn and religious confirmation of the promise made to that person; but it is no vow; it does not contain a particular promise made to God to accomplish the promise, nor consequently any obligation towards God. 2d. Even suppose the oath should be considered as a kind of vow made to God to accomplish the promise, the vow would not be obligatory before God: for upon the same principle that promises made to men are not obligatory, except inasmuch as they are accepted by those to whom they are made, so vows made to God are not obligatory before him, except so far as it may be supposed that he agrees to and accepts them. Now it cannot be supposed to be agreeable to God, and to be assented to by him, that an innocent person should strip himself of his property for the benefit of a ruffian, who has extorted his promise by an unjust violence.

With regard to the respect which is due to the sacred name of God, and upon which *St. Thomas* founds the obligation of fulfilling what is promised with an oath, it cannot indeed be disputed

that it is a violation of the respect due to the sacred name of God, and a heinous offence to promise with an oath, even under the impression of force, what we have no intention to perform, and that this is to make his name subservient to a lie ; and this *Puffendorf* admits. But after the oath is taken, whether the person had at the time a real intention of fulfilling his promise, in which case there would be nothing sinful, or whether he had not, in which case there would be a sin in taking the oath, the violation of this oath does not appear to *Puffendorf* to be criminal, or contrary to the duties of religion. Repentance, for having taken the oath, without an intention of performing it, may appear to require that we should give what we have promised : and in the case in which there was an intention of giving it, the fear of giving offence to weak minds might also be an inducement for the performance of the promise ; but in this case, *Puffendorf* thinks it would be better to apply what was promised to charitable purposes, than to give it to the person who extorted the promise to whom it is not due, and who might be induced by our giving it to him to persist in his criminality.

[112] It remains to say a word concerning fraud. There is no doubt but that a promise, although attested by an oath, which has been surprized from me by the fraud of the person to whom I make it, is not obligatory in respect of him ; for his fraud obliges him to release me from it, as much as in the case of violence. But does the oath oblige me in the sight of God to fulfil my promise ? according to the system of *Puffendorf*, who thinks that no obligation arises from an oath extorted by violence : there should be none in this case. In adopting the sentiment of *Grotius*, and others, who think that the oath extorted by violence is obligatory, we must not always conclude, that that of a person surprized by the fraud of the party, to whom the promise is made, is so likewise ; for when it is manifest that the oath had no other foundation, than the false supposition of some fact without which the promise would not have been made. *Grotius, ibid. n. 4.* agrees that the oath has no effect even before God, *ibid. n. 4.* The reason of the difference is, that a person who makes a promise, though under constraint, promises absolutely, and without making his promise depend upon any condition ; whereas the other in some degree intends that his promise shall depend upon the truth of what he supposes to be the fact, and which supposition is the foundation of it.

SECTION II.

Of other Causes of Obligations.

§ I. Of Quasi Contracts.

[113] A Quasi contract is the act of a person permitted by the law which obliges him in favour of another, without any agreement intervening between them (a).

For instance, the heir's acceptance of the succession is a quasi contract in favour of the legatees; for it is a fact permitted by the law, which obliges the heir to the payment of the legacies without the intervention of any agreement between him and the legatees.

Another instance of a quasi contract is, when a person pays by mistake what he does not owe. The payment is a fact which obliges the other party to restore what he has received, although there cannot be said to be any agreement for such restitution.

The undertaking the business of a person who is absent, without a previous direction, is also a quasi contract, which obliges us to render an account of it, and obliges the absent person in certain cases to indemnify us from the expences.

There are many other instances of quasi contracts which we pass over in silence (b).

[114] In contracts, it is the consent of the contracting parties which produces the obligation; in quasi contracts there is not any consent. The law alone, or natural equity, produces the obligation, by rendering obligatory the fact from which it results. Therefore these facts are called quasi contracts; because without being contracts, and being in their nature still further from injuries, they produce obligations in the same manner as actual contracts.

[115] All persons, even infants, and persons destitute of reason, who are consequently incapable of consent, may be obliged by the quasi contract, which results from the act of another, and may also oblige others in their favour; for it is not consent which forms these obligations; they are contracted by

(a) *Pinnius* observes, that the particle *quasi* is a mark of similitude and impropriety; the impropriety is denoted when the obligation is said to be formed without agreement, the similitude, when it is shewn to proceed from a lawful act, and which distinguishes it from offences or injuries.

(b) We have no term in the *English* law strictly corresponding with that of quasi contracts in the civil law: many of the cases falling within the definition of that term, may be ranked under the denomination of implied contracts, but that denomination is applicable rather to the evidence than to the nature or quality of the obligation, as in judgment of law an actual promise is deemed to have taken place, and the consequences are the same as if such promise had been declared by the most express and positive language.

the act of another, without any act on our part. The use of reason is indeed required in the person whose act forms a quasi contract, but it is not required in the person by whom, or in whose favour the obligations which result from it are contracted.

For instance, if a person undertakes the business of an infant, or a lunatic, this is a quasi contract, which obliges the infant or the lunatic to account to the person undertaking his affairs, for what he has beneficially expended, and reciprocally obliges that person to give an account of his transactions.

It is the same with respect to women who are under the power of their husbands; they may in this way be obliged towards others, or oblige others towards them, without being authorized by their husbands; for the law which prohibits their obliging themselves or doing any thing independently of their husbands, and without their authority, only annuls what is done without such authority, and not the obligations, which are formed without any act on their part (a).

§ II. Of Injuries and Negligencies.

[116] Injuries (*delicta*) are the third cause which produces obligations, and *quasi delicta* (or negligence) the fourth.

Injury (*delictum*) is when a person by fraud or malignity causes any damage or wrong to another.

(a) Infant is here meant in its popular sense, and not in the technical sense of the *English* law, as synonymous to minor.

(b) The cases in the *English* law, where a person is obliged by the act of another, without his own assent, are very few: wherever such assent forms a material ingredient, it induces all the consequences, and must have all the requisites of a contract, and operates as such.

Minors are in general only obliged by contracts for necessities, and I am not aware that any person supplying them with necessities, without any act on their part, amounting in its nature to a contract, can induce a personal obligation against them; but the doctrine of the civil law upon this subject is highly reasonable, and probably would be in some degree adopted. For instance, it had been decided, that a person was liable to the expences incurred by burying his wife in his absence. *Jenkins v. Tucker*. 1 H. B. 90. and such a liability ought in justice not less to attach upon a minor than upon an adult, it being an act which would be obligatory upon him if accompanied by an actual contract.

The case of infants so young as to be incapable not only of legal but of moral assent, and of persons wholly destitute of reason from infirmity, is one on which I am not prepared to offer any confident opinion, but I rather think that where the mind is incapable of assent, no obligation in the nature of a contract can be produced.

As to married women, it is perfectly clear, that they cannot be subject to any greater obligation from quasi contracts, than from actual contracts. The case of having any lien upon the property, in respect of which the obligation may be occasioned, is very different from an obligation attached to, and compulsory on the person.

Quasi delicta, are facts by which a person causes damages to another, without malignity, but by some inexcusable imprudence.

[117] These differ from quasi contracts, inasmuch as the fact, which is the subject of a quasi contract, is permitted by the law, whereas the fact which forms a *delictum* or *quasi delictum* is something reprehensible.

[118] It results from this definition of *delicta* and *quasi delicta*, that none but persons who have the use of reason are capable of them ; for infants and persons destitute of reason are not capable of either malignity or imprudence.

Therefore if an infant or a madman does something which causes an injury, no obligation results therefrom against them, the fact is neither a *delictum* nor a *quasi delictum*, as it does not include either malignity or imprudence.

We cannot precisely define the age at which persons have the use of reason, and are consequently capable of malignity, some having it much sooner than others. The fact ought to be estimated by circumstances ; but as soon as a person has the use of reason, and we can perceive reflection and malignity in the fact by which he has caused an injury to another, such fact is a *delictum*, and the person who commits it, although he has not attained the age of puberty, contracts an obligation to repair it ; hence arises the maxim *neminem in delictis atas excusat* ; imprudence is more easily excused in young persons (a).

[119] Although drunkenness causes a person to lose his reason, he is nevertheless liable for the reparation of the injury which he has caused when in that state ; for it is his own fault voluntarily to become so, and herein a drunken person differs from infants and madmen, to whom no fault can be imputed.

[120] There is no doubt but that a person interdicted for prodigality, is obliged to repair the injury occasioned by his misconduct or negligence (*delicta* or *quasi delicta*), although he

(a) This distinction is in many respects similar to that between actions of trespass and actions on the case in the *English* law.

(b) In the *English* law, minority is no defence to actions founded upon torts, but the observations of *Pothier*, as to infants, are necessarily deduced from natural reason. The effect of those observations is not that malignity or imprudence is excused, but that it cannot exist.

There are some cases in the *English* law, where a party may elect to treat a case as a breach of contract or as an injury ; but if the act is in its nature founded upon contract, and in that respect no obligation arises on account of minority, the stating it as an injury will not make any difference.

This was decided in an action brought by a person against a minor for riding a horse which had been lent in an improper manner ; in consequence of which the horse was injured. *Jennings v. Randal*. 3 T. R. 335.

cannot incur any obligation by his contracts. The reason of the difference is evident; those with whom he contracts must impute the consequence to themselves; the interdiction being public ought consequently to be known. But nothing can be imputed to those who have sustained an injury; they ought not to suffer from the interdiction, neither ought it to procure an indemnity for injuries. This reason serves also to decide, that a person under an interdiction may be condemned to pecuniary damages, for the injuries which he commits, contrary to the doctrine of the gloss, *ad l. si quis 7 cod. unde vi.*; of Bartolus, *ad l. is qui bonis, 6. ff. de verb. obl.* and some other authors, who say, *poteſt quidem ſe obligare ad pœnam corporalem, ſed non ad pœnam pecuniariam, qui res ſuas alienare non poteſt*: for the interdiction is only eſtabliſhed to prevent his contracting imprudently, and not to give him impunity for his injuries.

Every thing which has been ſaid of perſons under an interdiction is applicable to minors who have attained the age of puberty, or approach towards it, except that faults of imprudence, which are called *quæſi delicta*, are more eaſily excuſed in theſe perſons than in thoſe interdicted for prodigality.

[121] Not only is the perſon who has committed the injury, or been guilty of the negligence, obliged to repair the damage which it has occaſioned; thoſe who have any perſon under their authority, ſuch as fathers, mothers, tutors, preceptors, are ſubject to this obligation, in reſpect of the acts of thoſe who are under them, when committed in their preſence, and generally when they could prevent ſuch acts, and have not done ſo; but if they could not prevent it then they are not liable, *nullum crimen patitur is, qui non prohibet, quum prohibere non poteſt, l. 109. ff. de reg. jur.*; even when the act is committed in their ſight, and with their knowledge, *culpa curet qui ſcit ſed prohibere non poteſt. l. 20. ff. d. l.*

Masters are alſo anſwerable for the injury occaſioned by the wrongs and negligence of their ſervants; they are even ſo when they have no power to prevent them, provided ſuch wrongs or injuries are committed in the exerciſe of the functions in which the ſervants are employed by their maſters, although in the maſter's abſence. This has been eſtabliſhed, to render maſters careful in the choice of whom they employ.

With regard to their wrongs, or neglect not committed in theſe functions, the maſters are not reſponſible.

[122] Obſerve, that thoſe who are liable to the reparation of an injury committed by another perſon, in which they have not concurred, are obliged in a different manner from the authors of the injury; the latter are liable to be impriſoned in default

fault of payment of the reparation awarded, when the injury is of a nature to warrant such imprisonment; the former can only be compelled to make satisfaction by the seizure of their effects, and not by the imprisonment of their persons.

§ III. Of the Law.

[123] Natural law is at least the mediate cause of every obligation; for if contracts and injuries produce any obligation, it is because natural law requires every person to perform his promises, and to repair the injuries which he has wrongfully occasioned.

It is the same law which induces an obligation from those acts, which fall within the description of quasi contracts.

There are some obligations of which either natural or positive law is the immediate and only cause; for instance, it is not by virtue of any contract that a person whose circumstances will admit incurs an obligation to provide for his father, or mother, being in a state of indigence; the obligation is wholly the effect of the law.

The obligation which a woman contracts to restore the money that she has borrowed without the consent of her husband, when that money has turned out to her benefit, is not founded upon any contract, or quasi contract; for the contract of loan which has been made by her without the authority of her husband, being a nullity, cannot in itself produce any obligation, *quod nullum est, nullum producit effectum*. Her obligation then is only founded upon the principle of natural law, which does not allow one person to enrich himself at the expence of another, *neminem æquum est cum alterius damno locupletari*, L. 206. ff. de Reg. Jur.

The obligation of the owner of a house in the city of Orleans, to sell his neighbour a common interest in the wall which separates the two houses, when the neighbour wishes to build against it, has no other cause than the municipal law of the place, which makes such a disposition (a).

And many other examples might be adduced, where natural and positive law is the only cause of obligation. These obligations produce an action called *condictio ex lege*.

(a) The obligation of the owner of a house in London, to join in the expence of a party-wall, is an instance of the same kind.

SECTION III.

§ III. Of the Persons between whom an Obligation may subsist.

[124] To constitute an obligation, it is necessary that there should be at least two persons, the person who contracts the obligation, and the person in whose favour it is contracted. The latter is called the debtor, the former the creditor (a).

[125] But though it is of the essence of an obligation that there should be two persons, the one a creditor, and the other a debtor, the obligation is not destroyed by the death of either; for the person is held to survive in his heirs, who succeed to all his rights and obligations (b).

[126] Even where the creditor or debtor does not leave any heir, they are considered as having survived themselves on the vacant succession; for the vacant succession of a deceased person represents him, assumes the place of his person, and succeeds to all his rights and obligations, *hereditas personæ defuncti vicem sustinet*, and this fictitious person, whether of the creditor or the debtor, is sufficient to sustain the obligation after their death.

An obligation may not only continue to subsist in the fictitious person of a vacant possession. There are even certain obligations which may be contracted by, or in favour of such fictitious person.

For instance, when a curator, appointed for a vacant succession, administers the effects of such succession, he contracts in favour of the fictitious person of the vacant possession, an obligation to render an account, and *vice versa*, the vacant succession, contracts an obligation for reimbursing his expences.

Many other instances might be stated of obligations contracted by a vacant succession; such as that contracted in favour of the minister who inters the deceased for the payment of funeral dues; *vice versa*, if any one steals effects belonging to the vacant succession, or commits any injury to it, there arises an obligation in favour of the succession (c).

[127] Corporations and communities are a kind of civil persons, who may contract obligations, and in whose favour they may be contracted.

(a) In *England*, these terms are not commonly applied to any other cases, than those in which there is a pecuniary debt.

(b) The cases in which an obligation does or does not cease by the death of either party, will be referred to, *post* p. 3. l. 7.

(c) Though the *English* law does not recognize the fictitious person of a vacant succession, it has recourse to another fiction for effecting similar purposes, by making letters of administration, when granted, relate to the time of the death, and by considering the administrator as invested with that character at a time when he was not so in point of fact.

[128] It is clear that madmen, idiots, and infants, are not capable of contracting obligations, which result from injuries or neglects, nor contracting by themselves those obligations which result from contracts, since they are incapable of consent, without which there can be neither agreement, nor injury, nor negligence. But they are capable of contracting all those obligations which may be contracted, without the immediate act of the person obliged. For instance, if any person beneficially undertakes the conduct of their affairs, they contract an obligation to reimburse him his expences, as has been already shewn, n. 115. They also contract all the obligations which their trustees contract for them, and in their names, n. 74.

According to the *Roman* law no obligation could be contracted between a father and a child who was under his dominion, except *ex certis causis, puta, ex causa castrensis peculii*. The reason was, that the child so under dominion could not have any thing of his own, and whatever he acquired, he acquired to his father. The paternal authority not having that effect in the law of France. There is nothing to prevent a father from contracting obligations in favour of his children, or children from contracting them in favour of their father (a).

S E C T I O N IV.

Of what may be the Object and Matter of Obligations.

[129] There cannot be an obligation without something being due, which is the object and matter of it.

§ I. *General Statement of what may be the Object of Obligations.*

[130] The object of an obligation may be either A THING (*res*), in the proper and confined signification of the word; which the debtor obliges himself to give, or an act (*factum*) which the debtor obliges himself to do or not to do. This results from the definition which has been given of the term *obligation*.

Not only things themselves (*res*) may be the object of an obligation, the mere use or possession of a thing may be so likewise. For instance, when a person hires any thing, it is the use of the thing, rather than the thing itself, which is the object of the obligation.

(a) The parental power in *England* is much more circumscribed than even in *France*. Particular contracts by children in favour of their father are disallowed in courts of equity, for the prevention of undue influence; but there is nothing to impede the general power to contract.

When a person engages to give me any thing by way of pledge, the object of the obligation is the possession of the thing, rather than the thing itself.

§ II. *What things may be the Object of an Obligation.*

[131] All things which are in commerce may be the object of obligations.

Not only a certain and determinate subject, as a particular horse, but also something indeterminate, may be the object of an obligation. It is necessary however that it should in its indetermination, a certain moral consideration, *oportet genus quod debetur habeat certam finitionem*, as a promise of a horse, a cow, a hat in general; but if the indetermination is such as to reduce the thing to almost nothing, there will be no obligation, for want of something to form the object and matter of it, because, morally speaking, *almost nothing* is regarded as nothing. For instance, money, corn, wine, without the quantity being determined, or determinable, cannot be the object of an obligation, because it may be reduced to almost nothing, as a farthing, a grain of corn, a drop of wine. For this reason, the 94. l. ff. *de verb. obl.* decides that a stipulation *triticum dare oportere*, does not produce any obligation, because it is impossible to know what quantity the contracting parties had in view (a).

It is not however necessary that the quantity which forms the object of the obligation, should be actually determined when the obligation is contracted, provided it be determinable. For instance, if a person obliges himself to indemnify me from the damages which I may suffer on such an occasion, the obligation is valid, although the sum of money to which they amount may not yet be determined, because it is determinable by the estimation which is to be made. So if a person obliges himself to supply me with corn, for the use of my family for a year, the obligation is valid, although the quantity is not determined, because it is determinable by an estimation of how much is necessary for that purpose.

Things which are not yet in existence, but which are expected to exist hereafter, may be the object of an obligation. The obligation must however depend upon the condition of their future existence.

As if I should oblige myself to deliver to a wine merchant all

(a) *Triticum dare oportere stipulatus est aliquis; facti quæstio est non juris. Igitur si de aliquo tritico cogitaverit, id est certi generis, certæ quantitatis: id habebitur pro expresse; alioquin si cum destinare genus et modum vellet, non fecit: nihil stipulatus videtur; igitur ne unum quidem modium.*

the wine that I shall grow the ensuing year, the obligation is valid, although the wine does not exist.

But if my vines are frozen, so that no wine can be got from them, the obligation fails for want of an object, and is as if it had never been contracted.

The rule, that things to arise in future may be the object of an obligation, was subject to an exception in the *Roman* law as to future successions. These laws proscribed as indecent, and contrary to general propriety, (*bonneté publique*,) all agreements with respect to future successions, whether a person contracted and disposed of his own future succession in favour of another person to whom he promised to leave it, even when the agreement was made by a contract of marriage, *l. 15. cod. de pact (a)*. or those by which the parties contracted upon the future succession of a third person, which they or one of them expected to receive, *l. fin. cod. de pact (b)*. at least unless such third person intervened and gave his consent to the agreement. *d. l. ad. f.*

In the law of *France*, the favour of marriage contracts admits of agreements respecting future successions. A person by his marriage contract may engage to leave his wife his future succession in the whole or in part, or to leave it to the children of the marriage. They may also by marriage contracts, make such agreements for the interest of the two contracting families concerning future successions, from a third person as they think proper. With the exception of contracts of marriage, agreements concern-

(a) Pactum quod dotali instrumento comprehensum est, ut, *si pater vita fungeretur, ex æque portione ea, quæ nubebat, cum fratre heres patris sui esset*: neque ullam obligationem contrahere, neque libertatem testamenti faciendi mulieris patri potuit auferre.

(b) De questione tali a Cæsariensi advocacione interrogati sumus: Duabus vel pluribus personis spes alienæ hereditatis fuerat ex cognatione forte ad eos devolvendæ; postaque inter eos inita sunt pro adventura hereditate, quibus specialiter declarabatur, *si ille mortuus fuerit & hereditas ad eos pervenerit, certos modos in eadem hereditate observari, vix si forte ad quasdam ex his hereditatis commodum pervenerit, certas portiones evnre*. Et dubitabatur, si hujusmodi pacta servari oporteret. Faciebat autem eis questionem quia adhuc superstite eo de cujus hereditate sperabatur, hujusmodi pactio processit; & quia non sunt ita confecta, quasi omnimodo hereditate ad eos perventura, sed sub duabus conditionibus composita sunt, *si ille mortuus fuerit & si ad hereditatem vocentur hi quo hujusmodi pactum fecerunt*. Sed nobis omnes hujusmodi portiones odiosæ esse videntur, & plenæ risti & periculosi eventus; Quare enim, quodam vivente & ignorante de rebus ejus quidam paciscentes, convenient? Secundum veteres itaque regulas, sancimus, *omni modo hujusmodi pacta, quæ contra bonos mores inita sunt repelli*; & nihil ex his portionibus observari nisi ipse forte, de cujus hereditate pactum est, voluntatem suam eis accommodaverit, & in ea usque ad extremum vitæ suæ spatium perseveraverit; tunc etenim sublata acerbissima scæ, licebit eis illo sciente & jubente, hujusmodi portiones servare: Quod etiam anterioribus [legibus &] constitutionibus non est incognitum, licet nobis clarius est introductum. Jubemus etenim, neque dona iores talium rerum neque hypothecas penitus esse admittendas, neque alium quemquam contractum; cum in alienis rebus contra domini voluntatem aliquid fieri, vel pacisci facta temporum nostrorum non patiatur.

ing future successions are rejected by the *French* law in the same manner as by the *Roman*.

We must not confound with a future succession the substitution or *fidei-commission* (a) of the goods of a deceased person, who has left them me, with the charge of restoring them to another person after my death. This substitution or *fidei-commission* is not a future succession; it makes no part in my future succession. It is a mere debt from me, payable after my death, to those entitled under the substitution, and who may treat respecting it in my life-time, either with me or amongst themselves. *l. 1. § 16. cod. de Pact.* (b) *l. 11. cod. de Transf.* (c)

The rule, that future things may be the object of an obligation is subject to another exception by the laws of police, such as those which prohibit dealers from buying corn, or hay, before the harvest (d), wool before the sheering, &c. and declare the contracts void.

[132] Even things which do not belong to the debtor but to another person may be the object of an obligation, as he is thereby obliged to purchase or otherwise procure them in order to fulfil his engagement; and if the real owner will not part with them, the debtor cannot insist that he is discharged from his obligation under the pretext that no man can be obliged to perform an impossibility. For this excuse is only valid in case of an absolute impossibility; but where the thing is possible in itself, the

(a) These, so far as relates to the present subject, are equivalent to remainders and contingent limitations in the *English* law.

The *English* courts of equity very much discourage bargains respecting expectancies; but the principle upon which they proceed has no relation to that of the *Roman* law respecting future successions, but is, as Mr. *Fonblaque* observes, to restrain the anticipation of expectancies, which must from its very nature furnish to designing men an opportunity to practise upon the inexperience or passions of a dissipated man. *B. 1. c. 2. §. 12.* Most of the cases reported upon the subject relate to vested reversionary interests, and are a kind of partial adoption of the objection of inequality of terms. I apprehend that, as a general rule, contracts respecting expectancies are not void. Certainly those which are entered into with respect to marriage are not so, being of frequent occurrence, and no objection having ever been made to them.

(b) *Conditionis incertum inter fratres non iniquis rationibus conventionis finitum est. Cum igitur verbis fideicommissi petitem a patre tuo profiteris, ut, si vita sine liberis decideret hereditatem, Licinio Frontoni restitueres; pactum eo tempore de sextante [Licinio] Frontoni dando cum liberos Philinus non sustulerit interpositum, non ideo potest iniquum videri; quod, facta (sicut placuit) divisione dñm suum, te filio ejus superstitis, functus esset.*

(c) Cum proponas, filijs testamentis scriptos heredes rogatos esse, ut qui primus rebus humanis eximeretur, alteri portionem hereditatis restitueret; quoniam precariam substitutionem fratrum consensu remissam adseris, fideicommissi persecutio cessat.

(d) Such contracts are also illegal by the law of *England*. How far that law is founded upon the principles of genuine policy is a question, which it would be foreign to the present purpose to discuss.

obligation subsists, notwithstanding it is beyond the means of the person obliged to accomplish it; and he is answerable for the damages occasioned by the non-performance of his engagement. The thing being possible in its nature, is sufficient to induce the creditor to rely upon the performance of the promise. The fault is imputable to the debtor, for not having duly examined whether it was in his power to accomplish what he promised or not.

[134] But though I may be obliged to give you what belongs to a third person, I cannot contract an obligation to give you what belongs to you already, *l. 1. § 10. ff. obl. et act. (a)* unless your right to it is imperfect, for then I may contract an obligation to render it perfect.

[135] It is evident that things not subject to commerce cannot be the object of an obligation, as a church, the parliament house, a bishoprick.

Neither can an obligation be contracted for giving any right to a person incapable of enjoying it, as an easement in my land to a person who is not the owner of the land adjoining. But it is not necessary that the person who engages should be capable of having and possessing the thing promised, provided the person to whom the engagement is made is capable of receiving it, *l. 81. ff. de Verb. Obl. (b)*

The edict of 1734, having rendered persons in mortmain incapable of acquiring immoveable property, no obligation can be contracted for giving them such.

A saleable office may be due to a woman; for though she is incapable of holding it, she is not incapable of having the revenue derived from it (*le droit de finance de l'office*). And it is that revenue, rather than the office, which is in commerce, and which is the object of the obligation.

§ III. *What Acts may be the Object of Obligations.*

[136] For an act to be the object of an obligation, it is necessary that it should be possible, for *impossibilium nulla obligatio est, l. 85. ff. de Reg. Jur.*

But it is sufficient that the fact to which a person obliges himself in my favour be possible in itself, though it may not be so with

(a) Nec minus inutilis est stipulatio si quis rem suam, ignorans suam esse stipulatus fuerit.

(b) Multum interest, utrum ego stipulos rem cujus commercium habere non possum, an quis promittat; si stipuler rem cujus commercium non habeo, inutilem esse stipulationem placet, si quis promittat, cujus non commercium habet; ipsi nocere, non mihi.

respect to him, because unless I am aware of that impossibility I have a right to rely upon the performance of it, and he is effectually obliged to me *in id quanti mea interest non decipi*. He must blame himself for not having measured the extent of his capacity, and for having rashly engaged to do an act to which he was not equal.

[137] An act contrary to law or good manners is regarded as impossible, and cannot be the object of an obligation.

For an act to be the object of an obligation it must be something determinate, therefore the 2d law, *ff. § 5. (a) de eo quod certo loco*, decides, that if a person promises another to build a house, without saying where, he does not contract any obligation (b).

[138] Lastly, the party in whose favour the obligation is contracted ought to have an appreciable interest in the act being done.

The reason is evident; an obligation being a legal tie, there cannot be any obligation if the person promising may violate his promise with impunity; and it is evident that he may do so when the other party has no appreciable interest in the performance or non-performance of it, for there cannot arise any damages to him for the non-performance, damages being nothing but the estimation of the interest which the creditor has in the performance of the obligation.

[139] But though an act in which the person to whom the promise is made, has no interest, cannot be the object of an obligation, it may be the condition of one. If you promise me that you will come to *Orleans* to study the law for a year, the promise would be void, and no obligation would result from it, because this fact, in which I have no interest, cannot be the object of an obligation to me.

But if I agreed to give you a hundred pounds in case you did so, the agreement would be valid; for although I had no interest in the act, it might be made the condition of my obligation.

(a) *Si qui si insulam fieri stipuletur & locum non adjiciat, non valet stipulatio.*

(b) But I conceive that this general obligation may acquire certainty, from the relative situation of the contracting parties. That point is however rather referable to the principle of construction, than to an exception to the general proposition in the text, which supposes the intention to be wholly indeterminate.

In *Allen v. Harding*, 2 *Eq. a. ab.* 17. The defendant being curate of *Newcastle*, had covenanted to build a house on the glebe land, which he afterwards refusing to do, the plaintiff brought a bill for a specific performance. The defendant insisted on the uncertainty of the agreement, it specifying neither the time when the house was to be built, nor what sort of a house it should be; but the Lord Chancellor observed, that the covenant was for the benefit of the church, and therefore if it could be specifically performed, it ought, and decreed a convenient house to be built, directing certain persons to regulate the manner.

Upon

Upon this principle it was ruled, that a promise by a nephew to his uncle to desist from play, under the penalty of three hundred livres, was valid, and induced an obligation to pay the money in case he failed in his promise.

[140] But though it is essential to a civil obligation, that the person with whom it is contracted should, for the reasons above-mentioned, have an interest capable of appreciation in the act to be done, it is otherwise with respect to a natural obligation. To constitute that, it is sufficient that there should be an interest arising from a just affection.

The person who makes the promise, and afterwards violates his engagement, having it in his power to accomplish it, is morally reprehensible, although he may not be accountable to any human tribunal (a).

(a) In *England*, nothing is more common than for a person to enter into covenants with another, who has no personal interest, and is only a trustee either for other individuals or for some public purpose, and the person to whom such covenant is made is entitled to the same actions, as if he had an immediate interest. But this is only a mode and form of engagement; the substance of the obligation is contracted in favour of those who are really interested, and the principle referred to by *Pothier*, is applicable to the inherent substance of the obligations, and not to technical forms, deduced from the municipal constitutions of particular countries.

Upon the general principle, it is observed by *Mr. Powell*, referring to the authority of the *Year Book*, 21 H. 7. 20. that if the subject of a contract or agreement be self-evidently useless, as tending to no purpose when put in execution, this will render the contract or agreement void; and the motive to consider it so will be still stronger, if it be of such a nature as, if not performed, it brings no loss or prejudice to the party stipulating it, and if fulfilled will create trouble or damage to the performer. I am not aware however of its having ever been actually decided, that an engagement by deed, or upon a legal consideration, would produce no action on the ground of there being no appreciable interest: for the mere gratification of an innocent whim may be an adequate inducement for one person to make it worth the while of another to enter into such an engagement. That damages in such a case would be only nominal, is a consideration which affects the prudence, rather than the foundation of an action. There are many cases in which nominal damages are given for the non-performance of a duty, although from such non-performance no detriment has actually ensued.

But some of the judges of the court of Common Pleas in a very recent case, (decided upon a different point) intimated an opinion that a covenant of daily occurrence, *viz.* a covenant between partners to appoint arbitrators to decide upon any dispute that might arise between them, was not obligatory; as it would be difficult to direct a jury upon what rule to proceed, in assessing damages on an action founded thereon; for *non constat* that the plaintiff would have succeeded in the arbitration. *Tattersall v. Groote*, 2 Bos. 131.

CHAPTER SECOND.

ARTICLE I.

Of the Effect of Obligations on the Part of the Debtor.§ I. *Of the Obligation to give.*

[141] A person, who is obliged to give any thing to another, is bound to give it to the creditor, or some one authorized on his behalf, at a suitable time and place. See Part III. Ch. I. where we shall treat of the discharge or payment of obligations.

[142] When the object of the obligation is a specific thing, the obligation has the further effect of obliging the debtor to use a proper degree of diligence in the preservation of it until it is delivered; and if it is destroyed or injured for want of such diligence, he is answerable in damages. We shall treat of these damages *infra*, Art. III.

The degree of diligence which the debtor is bound to apply is different, according to the different nature of the engagements upon which the obligation depends. The 5th law, *F. commodat.* (a) supplies the following rule. When the contract solely regards the utility of the person to whom the property is to be given, or restored, the debtor is not bound beyond the application of fidelity in preserving it, and consequently is only answerable for that neglect which borders upon fraud, *tenetur duntaxat de latâ culpâ et dolo proximâ*.

For instance, a depositary is answerable for nothing more than fidelity in keeping the article entrusted to his care; for the taking the deposit is merely for the benefit of the person by whom it was made, and to whom the depositary is obliged to restore it. If the contract is for the common benefit of both the parties, the debtor is bound to use that ordinary diligence which persons of prudence apply to their own affairs, and is therefore answerable for slight neglect. For instance, the seller is answerable for this neglect with respect to the article sold; and which he is obliged to deliver: the creditor is answerable for his neglect in the custody

(a) In contractibus interdum dolum solum, interdum & culpam præstamos: dolum, in deposito; nam quia nulla utilitas ejus versatur apud quem deponitur, merito dolus præstatur solus, nisi forte & merces accessit; tunc enim (ut est & constitutum) etiam culpa exhibetur: aut si hoc ab initio convenit, ut & culpam & periculum, præstet is, penes quem deponitur. Sed ubi utriusque utilitas vertitur, ut in empto [ut] in locato [ut] in dote [ut] in pignore [ut] in societate, & dolus & culpa præstatur.

of a pledge, which he is under the obligation to restore; because the contracts of sale and pledging are for the benefit of both the parties. Where it is solely for the benefit of the debtor, such as a gratuitous loan of goods to be used, and specifically restored, he is obliged to apply more than ordinary diligence, and is consequently answerable for the slightest neglect.

But this rule is subject to several exceptions, as will be shewn in the essays, where the different kinds of contracts are immediately under consideration (a).

The debtor of specific things, (*d'un corps certain*) is never answerable for accidents, and cases of inevitable necessity, (*cas fortuits et la force majeure, vis divina*) until he is guilty of improper delay; or (according to the law of France, is *en demeure de payer*,) at least unless he has subjected himself to the loss arising therefrom by particular agreement; or unless the accident is occasioned by some preceding fault of his own. For instance, if I lend you my horse to go to some particular place, and you are attacked by robbers, who take away or kill the horse; although this violence is an accident for which a debtor is not ordinarily liable, nevertheless, if instead of taking the safe and usual road, you go by some cross way known to be infested by robbers, and are there attacked, you will be answerable for the accident, because it is occasioned by your imprudence.

[143] It is also an effect of the obligation to give, on the part of the debtor, that when he is guilty of any improper delay, (is *en demeure*) in satisfying his obligation, he is answerable for the damages of the creditor arising from such delay; and consequently ought to indemnify the creditor for every thing which he could have had, if the thing was delivered when demanded.

In consequence of this principle, if the thing due is deteriorated, or even totally destroyed, after such delay, by any inevitable accident, the debtor is answerable for the loss, unless the thing would have equally perished in the hands of the creditor.

Upon the same principle, the debtor is answerable, not only for

(a) The translator has long since prepared essays upon all these different species of contracts, using the assistance of *Pothier*, but proceeding upon a much more limited scale, in the hopes of hereafter offering them to the Profession. He has retained the passage which refers to the various treatises of his author. The degree of diligence which is to be applied in respect to the different classes of contracts, is the subject of Sir *Wm. Jones's* admirable Essay on the Law of Bailments, which consists in an amplification of the maxim in the text, and an historical view of the application of it in the various systems of jurisprudence. To the recommendation of that most celebrated performance, the *English* reader may principally ascribe an acquaintance with the writings of *Pothier*.

Pandectus, in his Commentary on the title of the Institutes, *quibus modis contrahitur obligatio, & de commodato cui*, has likewise a very valuable discussion of the same subject.

the fruits which have been actually received, but also for such as might have been received by the creditor, if a delivery had been made in proper time.

[144] Observe, that by the law of *France*, a debtor is only considered as chargeable with delay (placed *en demeure*) of giving the thing due from him, after a judicial interpellation regularly made, and from the time of such interpellation.

This decision takes place, although the thing be due to minors, or the church; the principles of the *Roman* law respecting demurrage, which was contracted *re ipsa* in favour of these claimants, not being followed (a).

From this decision an exception must be made in the case of persons acquiring possession wrongfully, (*les voleurs*) who are held to be *en demeure*, as to satisfying the obligation which they have contracted of restoring the thing taken, from the instant of their taking it, without any judicial interpellation being requisite. *L. . de fin cond. furtiv. (b)*.

The debtor ceases to be *en demeure*, by making a regular offer, which places the creditor *en demeure*, (c) as to the receipt of the thing which is to be given.

[145] The obligation of giving a thing sometimes extends to the fruits thereof, if it procures any; and to interest when the debt is of a sum of money: ordinarily the debtor is only answerable for the fruits which have been, or might have been got after a judicial interpellation; and in like manner interest runs from that time. Although sometimes fruits and interest are due before the debtor is *en demeure*, as in contracts for the sale of a productive article. This depends upon the different nature of the contracts, and other causes producing the obligations, as is shewn in treating of the different contracts, and quasi contracts (d).

§ II. Of the Obligation to do, or not to do any Act.

[146] The effect of the obligation, which a person contracts to do any act, is, that he ought to do what he has en-

(a) In *England* we have no proceeding analogous to this judicial interpellation. I conceive that a neglect to deliver at a proper time, or upon demand, is in general attended with the same effects, as in *France* are consequent upon such proceeding.

(b) *Licet fur paratus fuerit excipere conditionem, et per me steterit, dum in rebus humanis res fuerat, condicere eam, postea autem perempta est; tamen durare conditionem veteres voluerunt; quia videtur qui primo invito domino rem contraxerit, semper in restituenda ea quam nec debuit auferre, moram facere.*

(c) This also is a judicial proceeding, which is referred to more at length. Part. iii. c. 1. Art. VIII.

(d) See note to N 142.

gaged, and that if he does not, after having been placed *en demeure*, he ought to be condemned in damages to the person in whose favour he is obliged; that is to say, *in id quanti creditoris interfit factum fuisse id quod promissum est*, which ought to be estimated at a sum of money by *experts* agreed upon between the parties.

Ordinarily, the debtor is not placed *en demeure*, except by a judicial demand, instituted by the creditor against him; that he may be compelled to the performance of his promise, or in default thereof may be condemned in damages.

The judge upon this demand prescribes a certain time, within which the debtor shall be bound to do what he has promised, and in default of his doing so, he condemns him in damages and expences.

If the debtor satisfies his obligation within the time prescribed, he avoids the damages, and is only answerable for the expences, unless the judge awards some damages for the retardation.

[147] Sometimes the debtor is answerable for the damages of the creditor, on account of not performing what he was obliged to do; although there was no judicial demand. This is the case when what the debtor is obliged to do can only be done with any benefit, within a certain time which he has suffered to elapse. For instance, if I employ an attorney to oppose on my behalf a decree for sale, under an execution, of an estate hypothecated to me, and he suffers the decree to pass without making any opposition, he is answerable to me in damages, although I have not instituted any demand against him, to oblige him to do what he has undertaken. The limited time, within which he ought to have known that the opposition should have been made, is a sufficient interpellation (a).

[148] The effect of an obligation which a person contracts of not doing any act is, that if he does such act, he is liable for the damages resulting from the prejudice which he has thereby caused to the person to whom he was under an obligation not to do it. When a person, who was obliged to do any act, is prevented by accident or force (*quelque cas fortuit et force majeure*) from doing it; and in like manner when a person has been forcibly constrained to do some act which he was obliged not to do, there is no ground for subjecting him to damages, for *nemo prestat casus fortuitos*.

(a) What was observed in the preceding section, of the law of *England* having nothing analogous to the judicial interpellation there mentioned, is equally applicable here. Except under particular circumstances, the liability to damages attaches without any demand, after a proper time has elapsed. That time may be either limited, or collected from inference. Where there is no limitation of time, and no delay is implied from the nature of the subject, the obligation attaches immediately.

Observe, that I ought in this case to apprise you of the circumstance which prevents my doing what I had engaged, in order that you may take the necessary measures for having it done by another: otherwise, I do not avoid the liability to damages, unless the same force prevents my apprising you of the impediment. *L. 27. § 2. (a).*

A R T I C L E II.

Of the Effect of Obligations, with respect to a Creditor.

[150] The effects of an obligation with respect to a creditor are, 1st. The right which it gives him of proceeding against the debtor in the course of justice for the payment of what is contained in the obligation.

2d. Where the obligation is of a liquidated sum, it gives the creditor a right of opposing it to his debtor by way of compensation or set-off, so far as it goes, against any money arising from him to his debtor. We shall treat of this right of compensation, *infra*, Part III. c. 4.

3d. The obligation serves the creditor as a foundation for other obligations, which persons may contract with him as sureties, on behalf of the party contracting, as principal. We shall speak of these sureties, Part II. c. 6.

4th. It may serve as the subject of a novation, (or substituted contract) where any such intervenes; as to novations, *vide infra*, Part III. c. 2.

We are to treat at present only of the first and principal effect of an obligation; which is the right it gives to the creditor of proceeding in a course of justice for the payment of what is due to him. We must in this respect distinguish between the case of an obligation, for giving any thing, and that of doing or not doing any act.

§ I. *Of the Case where the Obligation consists in giving any thing.*

[151] The right which this obligation gives the creditor of proceeding to obtain the payment of the thing, which the debtor is obliged to give him, is not a right in the thing itself;

(a) Qui mandatum suscepit, si potest id explere, deferere promissum officium non debet, alioquin, quanti mandatoris interfit, damnabitur; si vero intelligit explere se id officium non posse, idipsum, cum primum poterit, debet mandatori nunciare, ut is, si velit, alterius opera utatur, quod si, cum possit nunciare, cessaverit, quanti mandatoris interfit, tenebitur; si aliqua ex causa non poterit nunciare, securus erit.

jus in re, it is only a right against the person of the debtor for the purpose of compelling him to give it, *jus ad rem*. *Obligationum substantia non in eo consistit ut aliquod corpus nostrum, aut servitutem nostram faciat ; sed, ut alium nobis adstringat ad dandum vel faciendum. L. 3. ff. de oblig. & act.* The thing which the debtor is obliged to give, continues then to belong to him, and the creditor cannot become proprietor of it, except by the delivery, real or fictitious, which is made to him by the debtor in performance of his obligation.

And till this delivery is made, the creditor has nothing more than a right of demanding the thing, and he has only that right against the person of the debtor who has contracted the obligation, or against his heirs and universal successors ; because the heir succeeds to all the rights (*actifs et passifs*) of the deceased, and consequently to his obligations ; and because the universal successor of the debtor, succeeding to his property, succeeds also to his debts, which are a charge thereon.

[152] Hence it follows, that if my debtor, after contracting an obligation to give a thing to me, transfers it upon a particular title to a third person, whether by sale or donation, I cannot demand it from the party who has so acquired it, but only from my debtor, who for want of the power of giving it to me, not having it himself, will be condemned to the payment of my damages resulting from the non-performance of his obligation. The reason is, as the obligation does not, according to our principle, give the creditor any right in the thing which is due to him, I have not any right in the thing which was due to me, that I can pursue against the person in whose hands it may be found ; the right which the obligation gives, being only a right that the creditor has against the debtor and his universal successors, I cannot have any action against the third person who has acquired the thing in question ; for, his acquisition being upon a particular title, he does not succeed to the obligation in my favour. *L. 15. cod. de rei vind. (a).*

For the same reason, if my debtor has given by will the thing which he was obliged to give to me, and dies, he will by his death have transferred the property therein to the legatee, according to the rule of law, that *dominium rei legata statim a morte testatoris transit*

(a) Quoties duobus in solidum prædium jure distrahitur, manifesti juris est, eum, cui priori traditum est, in detinendo dominio esse potiorum. Si igitur antecedente tempore te possessionem emisse, ac pretium exsolvisse apud præsidem provincie probaveris ; obtentu non datorum instrumentorum expelli te [a] possessione non patietur. Erit sane in arbitrio tuo pretium, quod dedisti, cum usuris recipere, ita tamen ut perceptorum fructuum ac sumptuum ratio habeatur ; cum, & si ex causa donationis utrique dominium rei vindicetis ; eum cui priori possessio soli tradita est, haberi potiorum conveniat.

a testatore in legatarium; for, having according to our principles continued the proprietor, he was enabled to transfer the property: it ought then to be delivered to the legatee, and I shall in this case only have an action for damages against the heirs of my debtor.

L. 32. ff. locat. (a)

[153] Observe however, that if the debtor was not solvent at the time of his transferring to another the thing which he was obliged to give to me, I may proceed against the person who has so acquired it, to procure a rescission of the alienation that has been made to him in fraud of my claim, provided he was privy to the fraud, in case his acquisition was upon an onerous title: if it was upon a gratuitous title, his privy would not be necessary. *Tit. ff. de iis quæ in fraud. cred. (b)*.

[This is followed by a passage relating only to the peculiar laws of France, which it is not thought material to insert.]

[154] Although a personal obligation does not in itself give the creditor in whose favour it is contracted any right in the thing which is the object of it; nevertheless, there are certain obligations to the execution of which the thing which is the object of it is specifically liable; and this liability gives the creditor a right in the thing, which enables him to enforce the execution of the obligation against third persons. Such is the obligation which results from the clause in a contract of sale, by which the buyer engages to let the seller re-purchase an estate upon re-imbursing him the price, and all expences. The estate, which is the object of this obligation of the purchase, is liable to the execution of this obligation, and the seller may enforce the performance of it against a third person; but it is not the obligation which produces this right; the obligation is not in itself capable of giving a right, except against the person who con-

(a) Qui fundum colendum in plures annos locaverat, decessit, & cum fundum legavit, Cassius negavit posse cogi colonum ut eum fundum coleret, quia nihil heredis interesset: Quod si colonus vellet colere, & ab eo cui legatus esset fundus, prohiberetur cum herede actionem colonum habere, & hoc detrimentum ad heredem pertinere; sicuti si quis rem quam vendidisset, necdum tradidisset, alii legasset, heres ejus emptori & legatario esset obligatus.

(b) It is a general principle of the *English* courts of equity, that what is agreed to be done for a valuable consideration, is to be considered as done; and therefore any specific property is for most practical purposes effectually transferred from the time of an agreement for that purpose, without waiting for the formal completion of the act of transfer. Therefore any person acquiring with notice, or without a valuable consideration, property which is agreed to be transferred to another, acquires it subject to the obligation resulting from the agreement, without any regard to the question of solvency in the contracting party. Where the property is transferred upon a valuable consideration to a person not having notice of the agreement, the right acquired by such transfer must prevail, in consequence of another rule; that where equity is equal, the law must prevail.

tracts it; the right results from the seller being considered as retaining a claim upon in the estate to answer the obligation contracted by the purchaser in respect to it.

[Here follow certain passages concerning the legal proceedings, whereby the performance of the obligation is to be enforced, which it is not thought material to insert.]

§ II. Of the Case in which the Obligation consists in doing or not doing any act.

[157] When a person is obliged to do any act, this obligation does not give the creditor a right of compelling the debtor specifically to perform the act which he is obliged to do, but only a right to have him condemned in damages for not performing his obligation.

To this obligation of damages, all obligations of doing any act may be resolved, for *nemo potest precise cogi ad factum* (a).

[158] When a person is obliged not to do any act, the right which this obligation gives the creditor, is that of proceeding against the debtor, in case of his contravening the obligation to recover the damages, arising from such contravention.

If what he was obliged not to do, and has done contrary to his obligation, is something which may be destroyed, the creditor may also proceed against his debtor for the destruction thereof. For instance, if my neighbour engages with me not to shut up his avenue, but to leave me a free passage through it, and in prejudice of this obligation builds a wall, or digs a trench, I may obtain a

(a) The real meaning of this is, that it is impossible in the nature of things for one man specifically to direct or constrain the actions of another; but by putting a restraint upon his person or property, he may be induced to do the act which is the object of his obligation, rather than submit to the continuance of such restraint. The doctrine of *Pothier*, derived from his own law, is, that the only mode of enforcing the performance of obligations to do an act, is by subjecting the party to the damages arising from its not being done. The *English* courts of equity, in exercising their jurisdiction of compelling the performance of acts agreed to be done, proceed by the imprisonment of the person in case of refusal, which is not a contradiction of the maxim of the *Roman* law above cited, but an application of it; such imprisonment not being any more a specific performance than a compensation in damages. It is always in the option of the creditor (except in some cases of technical impediments), to proceed, not for the specific performance, but for a compensation in damages; but the converse does not hold good; and where pecuniary damages are, in the nature of the thing, a full and adequate compensation, the courts will not in general entertain a suit for the compelling a specific performance. See *Treatise of Equity*, p. 1. c. 1. §. 5. c. 3. §. 1. and *Mr. Fonblanque's Notes*. See also, *Errington v. Amesly*, 2 Bro. Cb. 343.

sentence that he shall take down the wall, or fill up the trench, and that in default of his doing so within a certain time, I may be allowed to do it at his expence (a).

A R T I C L E III.

Of the Damages and Interest arising from the Non-performance of Obligations, or the Delay in performing them.

[159] Damages and interests are the loss which a person has sustained, or the gain which he has missed; this is the definition of the law, 13. ff. *Rat. Rem. hab. quantum mea interfuit; id est quantum mihi abest, quantumque lucrari potui.* Therefore when it is said that the debtor is liable for the damages and interests (b) resulting from the non-performance of the obligation, it is to be understood that he ought to indemnify the creditor from the loss which the non-performance of the obligation has occasioned to him, and for the gain of which it has deprived him.

The

(a) I conceive that a court of equity would compel the party to replace the subject as if the act had not been done, in contravention to the agreement, but would not add the alternative of allowing the covenantor to do it at the expence of the 'covenantor. In the case of *Martin and his wife v. Narkin*, 2 P. Wms. 266, it appeared that the plaintiffs, who were infirm, were much disturbed by ringing the church bell at five o'clock in the morning, agreed with the parishioners to erect a new cupola, clock and bell, the parishioners agreeing on the other hand, that the five o'clock bell should not be rung during the lives of the plaintiffs, or the life of the survivor of them. After the agreement had been performed on the part of the plaintiffs, a new order of vestry was made for ringing the bell, and the Court of Chancery decreed an injunction to restrain it.

(b) In the *French* writers we always find these terms combined. I have retained them in the present article, but in the other parts of the Treatise have only used the word Damages. According to the *English* law the estimation of damages is peculiarly the province of the jury, but is so far subject to the controul of the courts, that in case of excess they may grant a new trial, referring the subject to the consideration of another jury. This discretion is exercised in a greater or less degree, according to the nature of the different causes of complaint. In cases particularly affecting the personal feelings, the conclusion of the jury is very seldom interfered with: In cases of injuries to property, a considerable latitude is allowed, and the damages often exceed the real measure of the injury, if there appears to be any act of wanton insult; but where the verdict indicates an intemperance of mind on the part of the jury, their decision is not unfrequently subjected to revision. The term *vindictive damages* has been often applied to the cases of a compensation more than commensurate to the real injury, but this term has been lately discountenanced.

With respect to damages proceeding merely on the non-performance of agreements, the Courts have been much more active in their interference; and there are several cases in which they have decided upon the principle by which the measure of damages ought to be estimated. In *Flureau v. Thornhill*, 2 Bl. 1078, the seller of a house by auction could not make a title, and the jury gave the buyer, besides his deposit, a compensation in damages for the loss of his bargain, which was disallowed, and a new trial was granted. In *Shepherd v. Johnson*,

[160] The debtor however is not to be subjected to indemnify the creditor indiscriminately for all the loss which may have been occasioned by the non-performance of the obligation, and still less is he answerable for all the gain which the creditor might have acquired, if the obligation had been satisfied. A distinction must be made in this respect, between different cases, and different kinds of damages and interests, and a certain degree of moderation ought also to be applied, in estimating those for which the debtor is liable.

When the debtor cannot be charged with any fraud, and is merely in fault for not performing his obligation, either because he has incautiously engaged to perform something which it was not in his power to accomplish, or because he has afterwards imprudently disabled himself from performing his engagements; the debtor is only liable for the damages and interest which might have been contemplated at the time of the contract; for to such alone the debtor can be considered as having intended to submit.

[161] In general the parties are deemed to have contemplated only the damages and interest which the creditor might suffer from the non-performance of the obligation, in respect to the particular thing which is the object of it, and not such as may have been incidentally occasioned thereby in respect to his other affairs: the debtor is therefore not answerable for these, but only for such as are suffered with respect to the thing which is the object of the obligation, *damni et interesse ipsam rem non habitam*. For instance, suppose I sell a person a horse which I am obliged to deliver in a certain time, and I cannot deliver it accordingly: if in the mean time horses have increased in price, whatever the purchaser is obliged to pay more than he would have given for mine, in order to procure another of the like quality, is a damage for which I am obliged to indemnify him, because it is a damage *propter rem ipsam non habitam*, and which only relates to the thing that was the object of the contract, and which I might have foreseen; the price of horses like that of all other things being subject to variation. But if this purchaser was a canon, who for want of having the horse that I had engaged to deliver to him, and not having been enabled to get another, was prevented from arriving at the place of his benefice in time to be entitled to his revenue;

v. *Jackson*, 2 East. 211. the Court decided that the proper damages upon an agreement for the transfer of stock was the highest price which it had been at since the time when the agreement ought to have been performed. In reviewing the distinctions of *Portier*, he seems to allow, in many cases, a higher scale of compensation than would be probably admitted by the *English* courts.

I should not be liable for the loss which he sustained thereby, although it was occasioned by the non-performance of my obligation; for this is a damage which is foreign to the obligation, which was not contemplated at the time of the contract, and to which it cannot be supposed that I had any intention to submit. So if I had made a lease for eighteen years of a house, which I fairly supposed to belong to me, and after eight or ten years my tenant is evicted by a superior title, I should be answerable for his damages and interest arising from the expence which he would be put to in removal; and also from his being obliged, in consequence of a general advance of rents, to take another house at a higher rent for the remainder of the term; for these damages and interests have an immediate relation to the enjoyment of the house, which is the object of my obligation, and are suffered by the tenant, *propter ipsum rem non habitam*.

But if the tenant has established a business in the house which I let to him, and his removal occasions a loss of custom, and an injury in his business, I shall not be answerable for this damage, which is foreign in its nature, and was not foreseen at the time of the contract.

Still less shall I be liable for the damage occasioned by any valuable furniture of the tenant being broken in the removal; for this is caused by the unskilfulness of the persons whom he employs, and not by the eviction, which is only the occasion of it.

[162] Sometimes the debtor is liable for the damages and interests of the creditor, although extrinsic; which is the case when it appears that they were contemplated in the contract, and that the debtor submitted to them either expressly or tacitly, in case of the non-performance of his obligation. For instance, I sell my horse to a canon, and there is an express clause in the agreement, by which I am obliged to deliver it him, so that he may arrive at the place of his benefice in time to be entitled to his revenues. If in this case I make default, in discharging my obligation, though without any fraud, and the canon could not either get another horse or any other conveyance, I shall be answerable even for the extrinsic damages arising from the loss of his revenues; for by the clause of the agreement the risk of this damage was foreseen and expressed, and I am deemed to have taken it upon myself.

So if I have let my house to a person in his quality as a tradesman, or for the purpose of being used as an inn, and the tenant is evicted; the damages and interests, for which I am answerable to him, will not be confined to the expence of removal, and the advance of rents, as in the former instance. The loss of custom,

custom, if he cannot meet with any other suitable house in the neighbourhood, ought also in some degree to be taken in the account; for having let my house for the purpose of a shop, or an inn, this kind of damage is one whereof the risk is foreseen, and to which I am considered as having tacitly submitted.

[163] The following is another instance of this distinction : a person sells me some pieces of wood, which I have used to prop my building, and on account of the insufficiency of the props the building gives way ; if the seller was not a person acting in the course of his business, and had fairly sold me these pieces of wood without knowing of their defect, the damages and interests would only consist in a reduction of the price on account of my having given him too much, by buying the wood as good, which was defective ; and will not extend to the loss arising from the failure of the building. For the seller who sold me the wood fairly, and who was not obliged to know any more of it than I, is not deemed to have undertaken this loss. *L. 13. ff. de act. empt. (a).*

But if the person who sold me these props acted in the course of his business, and was a carpenter, selling them for the purpose of supporting my building, he will be answerable for my damages and interest arising from the building giving way on account of the insufficiency of the props, and will not be permitted to alledge that he thought they were good and sufficient ; for admitting what he says to be true, this ignorance on his part would not be excusable in a person making a public profession of an art ; for in this case *imperitia culpæ annumeratur, l. 132. ff. de. R. I.* In selling me these props, and selling them in his quality of a carpenter, he is held to render himself responsible for their sufficiency, and to have subjected himself to the risk of my building, if they were not so. *Molin. tract. de eo quod interest, n. 51.*

Observe however that he ought not to be liable beyond the risk which he undertook. Therefore if he sells me the props to support a certain building, and I make use of them to support another, which is more considerable, the carpenter will not only not be liable for the ruin of this building, in case the props were sufficient for the smaller building, for which they were intended ; because in this case he would not be in any fault at all : but even if he was in fault, his props being absolutely defective and insufficient even for the support of the smaller building for which they were intended, he will not be answerable for any damages and interests resulting from the ruin of the large building,

(a) Qui pecus morbosum aut lignum vitiosum vendidit, si quidem ignorans fecit, id tantum exempta actione præstaturum, quanto minoris esset empturus.

beyond the value of the small one ; for having only sold the props for the support of that, he is only understood to take upon himself the risk of the damages and interests which I should suffer to the extent of the value of the small building ; he ought not therefore, according to our principles, to be answerable to a greater amount. Perhaps he would have been more cautious, if he had thought that he had been running a greater risk, and that he was selling the props for the support of the larger building. *Molin. tract. de eo quod interest, n. 62.*

For a similar reason, *Dumoulin* decides, that when a carpenter sells me props for the purpose of raising my building, which give way on account of their insufficiency, the damages and interests to which he is liable are confined to the ruin of the building, and do not extend to the loss which I sustain, in respect to the furniture which was then within it, and which is broken or destroyed in the ruins ; for in selling me these props he only understood himself to be answerable in respect to the conservation of the building. He is therefore only charged with this risk, and not with the risk of the loss of the furniture, which he could not foresee that I should leave there, it being customary to remove the furniture from houses when they are raised by props. Therefore he ought not to be liable for the loss of the furniture, unless he expressly took this risk upon himself. *Molin, ibid. n. 63. n. 64.*

It is otherwise with respect to a builder, with whom I make an agreement to build me a house, which some time after it has been finished, gives way from a defective construction ; the damages and interests for which this unskilful builder is liable to me, for want of his having properly discharged his obligation, extend not only to the loss in respect of the house, but likewise to the furniture which was therein, and which could not be saved ; for by undertaking to build me a house for the residence of myself or a tenant, he could not be ignorant that furniture would be taken there, and that it would be impossible to live there without furniture ; and consequently he is chargeable with the risk of the furniture. *Molin, ibid. n. 64.*

[164] It remains to observe, with respect to the damages and interests to which a debtor is liable for want of having fulfilled his obligation, where he is not subject to any imputation of fraud, that where the damages and interests are considerable, they ought not to be taxed and liquidated with rigour, but with a certain degree of moderation.

It is upon this principle that *Justinian*, in the single law of the *Code, de sentent. quæ pro eo quod interest*, (a) ordains that the damages and

(a) Cum pro eo quod interest, dubitationes antiquæ in infinitum productæ sint, melius nobis visum est hujusmodi prolixitatem, prout possibile est, in angustum coarctare.

and interest in *casibus certis*, that is to say, as *Dumoulin* explains it, *ibid.* n. 42, and *seq.* when they only relate to the thing which is the object of the obligation, cannot be taxed at more than double the value of the thing.

The decision of this law may be applied to the following case: I purchase for 500*l.* a vineyard in a distant province; at the time of my acquisition, the wine, which constitutes the whole revenue of this estate, is at a very low price in this province, because there is no communication for exporting it; after my acquisition the king makes a canal which gives me the opportunity of exportation, and which raises the price four-fold or more, and consequently raises the value of my estate to 2000*l.* or more; it is evident, that if I am evicted from this estate, my damages and interests resulting from this eviction, which are nothing else than *id quanti mihi hodie interest hunc fundum habere licere*, amount in fact to more than 2000*l.* Nevertheless, according to this law the person who *bona fide* sold me the estate, ought not to be condemned in more than 1000*l.* for all the damages and interests which are due to me, as well for the increased value of the estate as on any other account. The damages and interests which in this case are only due *propter ipsam rem non habitam & in casu certo*, ought never according to this law to amount to more than double the price of the thing, which is the object of the obligation.

The principle upon which this decision is founded, is that the obligations which arise from contracts can only be formed by the consent and intention of the parties. Now the debtor in subjecting himself to the damages and interests which might arise from the non-performance of his obligation, is only understood as intending to oblige himself, as far as the sum to which he might reasonably expect that the damages and interests would amount at the highest: then, when these damages and interests happen to amount to an excessive sum, of which the debtor could never have any expectation, they ought to be reduced and moderated to the sum to which it could reasonably be expected that they might

Sancimus itaque, in omnibus casibus, qui *certam* habent quantitatem vel naturam, veluti in venditionibus & locationibus & omnibus contractibus, hoc, quod interest, dupli quantitatem minime excedere. In aliis autem casibus, qui *incerti* esse videntur, judices, qui causas dirimendas suscipiunt, per suam subtilitatem requirere, ut hoc, quod revera iuducitur damnum, hoc reddatur, & non ex quibusdam machinationibus & immodicis perversionibus in circuitus inextricabiles redigatur, ne dum in infinitum computatio reducitur, pro sua impossibilitate cadat: cum sciamus esse naturæ congruum, eas tantummodo penas exigi, quæ vel cum competenti moderamine proferuntur, vel à legibus certo sine conclusæ statuuntur, et hoc non solum in damno, sed etiam in *lucro* nostra amplectitur Constitutio: quia & ex eo veteres id, quod interest, statuerunt, et sit omnibus secundum quod dictum est, *scilicet* antiquæ prolixitatis hujus Constitutionis recitatio.

amount

amount at the highest, the debtor not being understood to have given any consent for binding himself further. *Molin. tract. de eo quod interest. n. 60.*

This law of *Justinian*, inasmuch as it limits the moderation of excessive damages and interests, precisely at double the value of the thing, is an arbitrary or positive law, which, as such, has not any authority in the provinces of *France*. But the principle on which it is founded, of not allowing a debtor who is free from the imputation of any fraud to be charged with damages and interests resulting from the non-performance of his obligation, beyond the sum to which at the utmost they might be expected to amount, being founded upon reason and natural equity, we ought to follow this principle, and moderate the damages and interests when they are excessive, agreeably thereto, leaving this moderation to the discretion of the judge.

[165] It is evident that the reduction of damages and interests to double the price of the thing, which is the object of the primary obligation, is only applicable to such as are merely due in respect of such thing considered in itself, and not to those which the creditor suffers extrinsically in his other property, when the debtor has expressly or tacitly submitted to them. For these damages and interests, not being due in respect of the thing which is the object of the primary obligation, cannot be regulated by the value thereof, and may sometimes amount to ten-fold such value, or more. For instance, the damages and interests for which a cooper is liable to me for selling me bad casks, results from the loss of the wine which I put into them, and which may amount to more than ten-fold the value of the casks; for by selling them to me in the course of his trade he is responsible for their goodness, and tacitly charges himself with the risk of the wine that may be put into them; this kind of damage being suffered, not in respect to the casks, but of the wine which is put into them, ought not to be regulated by the price of the casks, *Molin ibid. n. 49.* Nevertheless, a certain moderation ought to be used even with respect to those extrinsic damages, when they are excessive, and the debtor ought not to be charged beyond the sum which he might have expected them to amount to at the highest. For instance, if I put in the casks foreign wine, or other liquor of an immense value, which is lost by the fault of the casks, the cooper who sold them to me ought not to be condemned to indemnify me for the whole of this loss, but only for the amount of a cask of the best wine of the country; for in selling me the cask he is not understood to have taken upon himself any further risk,

risk, nor to have foreseen that I should use it for a liquor of more considerable value. *Molin, ibid. N. 60.*

For the same reason, though the builder of the house, which gives way from the badness of the construction, is answerable to me, as has been already observed, for the loss of the furniture that is destroyed or broken by the ruins, yet if I had lost jewels, or manuscripts of an immense value, he ought not to be charged for the whole of this loss: he is only answerable for the value to which the furniture of a person of my situation may commonly amount.

[166] The principles, which we have hitherto established, do not prevail when it is the fraud of my debtor, that gives me a claim for damages and interests: in this case the debtor is liable, indiscriminately, for all the damages and interests which I have suffered in consequence of his fraud; not only for those which I have suffered in respect of the thing which is the object of the contract, *propter rem ipsam*, but for all damages in respect of any other property, without regarding whether the debtor could be presumed to have intentionally subjected himself to them or not; for a person who commits a fraud obliges himself, *velit, nolit*, to the reparation of all the injury which it may occasion. *Molin, ibid. N. 155.*

For instance, if a person sells me a cow, which he knows to be infected with a contagious distemper, and conceals this vice from me, such concealment is a fraud on his part, which renders him responsible for the damage that I suffer, not only in that particular cow, which is the object of his original obligation, but also in my other cattle, to which the distemper is communicated, *L. 13. ff. de act. empt.* (a) for it is a fraud of the seller which occasions this damage.

[167] Will my debtor be answerable for other damages which I suffer, and which are only a more remote and indirect consequence of this fraud? For instance, if upon the supposition last mentioned, the contagion which has been communicated to my other cattle, prevents me from cultivating my land; the damage, which I suffer from my land being uncultivated, appears also to be a consequence of the fraud of the person selling me the infected cow; but it is a more remote loss than that which I

(a) *Julianus, lib. 15.* Inter eum, qui sciens quid aut ignorans vendidit, differentiam facit in condemnatione ex empto; sic enim qui pecus morbosum, aut lignum vitiosum vendidit, siquidem ignorans fecit, id tantum ex empto actione præstaturum, quanto minoris essent emptoribus, si id ita esse scissem; si vero sciens reticuit & emptorem decipit, omnia detrimenta, quæ ex ea emptione emptor traxerit, præstaturum ei, siue igitur ades vitio ligni corruerunt, sedium estimationem, siue pecora contagione morbofi pecoris perierunt, quod interfuit idoneè venisse erit præstandum.

suffer in my cattle from the contagion : the question is, whether the feller is to be responsible for it ? What if the loss of my cattle, and the damage which I sustain from my land being uncultivated, prevents me paying debts, and my creditors seize upon my property, and dispose of it much below the value ; will the feller also be liable to this damage ? The rule, which appears proper to be followed in this case, is, that we ought not to include in the damages, for which the debtor is, liable, by reason of his fraud, those which are not only a remote consequence, but are not even necessarily a consequence of it, and may arise from other causes. For instance, in the case supposed, the feller will not be liable for the damage which I suffer from the seizure of my effects ; this damage is only a very remote and indirect consequence of his fraud, and has not any necessary relation to it : for, although the loss of my cattle occasioned by his fraud has had an influence in the derangement of my fortune, this derangement may have had other causes ; this is conformable to the doctrine of *Dumoulin, ibid. N. 179*, where, in speaking of the damage for which the tenant of a house is liable, for having maliciously set fire to it, he says, *Et adhuc in dolo intelligitur venire omne detrimentum tunc et proxime secutum non autem damnum postea succedens ex novo casu, etiam occasione dictæ combustionis sine qua non contigisset ; quia istud est damnum remotum quod non est in consideratione.*

The loss, which I suffer for want of cultivating my lands, appears to be a less remote consequence of the fraud of the feller ; nevertheless, I think that he ought not to be liable for the whole of it. This want of culture is not an absolutely necessary consequence of the loss of my cattle : for, notwithstanding such loss, I might have obviated the want of cultivation by buying, or if I had not the means of that, by hiring other cattle, or by farming out my lands, if I had not the means of turning them to account myself : nevertheless, in recurring to these expedients I should not derive so much profit by my land, as if I could have cultivated it myself, by the cattle that were lost in consequence of the fraud : this therefore may in some degree be taken into the account of the damages and interests for which he is liable.

[168] The damages and interests which result from the fraud of the debtor, differ also from ordinary damages and interests ; inasmuch as the law of the *code* above cited, and the moderation which, according to the spirit of that law, is observed with respect to common damages and interests, does not apply to those which result from fraud. The reason of the difference is evident ; this moderation, which is practised with respect to ordinary damages and interests, is founded upon the principle already developed,

developed, that a debtor cannot be presumed to have intended to subject himself to the obligation of damages and interest to a greater amount than he could suppose that the damages and interests to which he submitted, in default of performing his obligation, would come to. Now this principle cannot have any application with respect to damages and interests arising from fraud; because whoever commits a fraud obliges himself indiscriminately, *velit, nolit*, to the reparation of the injury which it occasions: it ought nevertheless to be left to the prudence of the judge, even in cases of fraud, to use a certain degree of indulgence in the estimate of damages and interests.

These decisions apply whether the fraud has been committed, *delinquendo* or *contrahendo*, *Molin, ibid. N. 155.*

[169] It remains to say a word concerning damages and interests resulting from the delay of the debtor, in the performance of his obligation.

A debtor is liable not only for the damages and interests of the creditor, resulting from the absolute non-performance of his obligation, but also for those which result from the delay of accomplishing it after having been judicially called upon to do so. (a)

These damages and interests consist in the loss which the creditor has suffered, and in the gain of which he has been deprived by the delay, provided such loss or deprivation of gain are the necessary consequences thereof. They are estimated rigorously, and extended to every kind of damage, when the debtor delays the performance of his obligation by fraud, and an affected contumacy. But, when he cannot be reproached with any thing more than negligence, they ought to be estimated with much more moderation, and should not be extended beyond what might have been foreseen at the time of the contract, and were therefore expressly or tacitly submitted to by the debtor. Such are the general rules; the following is a particular one, with respect to a delay in the performance of obligations, which consists in giving a certain sum of money. As the different damages and interests which arise from the delay of satisfying this kind of obligation are infinitely various; and as it is equally difficult to foresee and prove them, it has been necessary to regulate them by a kind of forfeit, by some fixed standard: this is done by fixing the interest of the sum due at the rates prescribed by the ordonnances, which begin to run against the debtor from the day of making a judicial demand, until the time of

(a) Here, as in former instances, it is to be observed that there is nothing in *England* analogous to this judicial interpellation. The obligation of the contract, if no time is limited, attaches immediately, on request, or at a reasonable time, according to the circumstances. The delay therefore is in itself an injury, and does not require any judicial proceeding to make it so.

payment; these interests being the common price of the legitimate profit, which the creditor might have derived from the sum due to him if it had been paid. In consequence of this kind of forfeit, however great the damage may be which the creditor may have sustained from the delay of payment, whether such delay has proceeded from mere negligence or from fraud, and an affected contumacy; the creditor cannot demand any other recompence than these interests. But, on the other side, he is not bound to prove any damage arising from the delay, in order to entitle himself to them.

[171] Our principle is subject to an exception with respect to bills of exchange. When a person, upon whom a bill of exchange is drawn, refuses to pay the amount at the time of its becoming due, the holder, having protested it, may, by way of damage and interest for the delay which he suffers, demand from the drawer and indorsers the re-exchange, even where it exceeds the common interest of money. Re-exchange is the profit which is paid to a banker on the spot, for money to the amount of the bill of exchange in lieu of that which ought to be received. See the Treatise on Bills of Exchange, N. 64.

[172] Such are the rules that should prevail in point of law; but in point of conscience, if the creditor does not suffer any damage from the delay of payment, that is to say, if such delay does not cause him any loss or deprive him of any gain, he ought not to demand these interests: for they are allowed as an indemnity, and no indemnity can be due to a person who has not suffered any damage.

Vice versa, if the damage which the delay occasions to the creditor is greater than these interests; according to the principles of conscience, if the debtor by fraud and an affected contumacy delays the payment, (*a etè en demeure de payer*,) of what he might easily pay, he ought entirely to indemnify the creditor for the damages which he knows to have been occasioned by his unjust delay; and it is not sufficient to pay the interest from the time of making the judicial demand.

It is otherwise when there is no fraud on the part of the debtor: the reason of the difference is, that, except in the case of fraud, a debtor is only liable for the damages and interests, to which it may be presumed that he intended to submit, which in this case are the interests accruing from the time of the delay. Another difference between the rules of law, and the rules of conscience, is, that in the latter it is not always necessary that there should be a judicial demand, in order to fix upon the debtor the imputation of delay, and to make the interests run against him: for, if my
creditor

creditor advises me that he is in want of his money, and at my request, and from regard to me, and in order to save my credit, forbears having recourse to a judicial process, relying upon my good faith, and upon the promise which I make to indemnify him in the same manner as if he had instituted such proceeding; I am in this case and in point of conscience sufficiently chargeable with delay, (*mis en demeure*,) by the notification, and I am liable for the interests which afterwards accrue. The author of the Conferences of *Paris*, concerning usury, improperly proscribes these interests as usurious: no interests are usurious but such as are demanded as the recompence for a loan which ought to be gratuitous; but these have a just cause, that is to say, the recompensing the injury which I occasion to my creditor by the delay in the performance of my obligation. This author proceeds upon the following reasoning. We only hold, says he, all the goods, and all the rights which belong to us, from the law. Now our laws only allow creditors a right of taking interest for the money due to them, when it is adjudged to them upon a judicial demand. Then, concludes this author, without a judicial demand, a creditor has no right to take any interest for the money due to him, and cannot conscientiously receive it.

The answer is, that if the creditor cannot in point of law demand interest without a judicial demand, it is because he cannot otherwise support the charge of a delay of payment, such a demand being the only proof of delay which the law allows; but if in truth his debtor does delay the payment after request, the creditor has a right to receive interest as a recompence for the injury arising from the delay. And he holds this right by the most respectable of all laws, the law of natural justice, which obliges debtors to fulfil their obligations, and to indemnify their creditor for the injury which he suffers in consequence of their delay. When a creditor, from regard for his debtor, forbears having recourse to judicial proceedings, which might ruin the credit of the debtor, he renders him a good office, and ought not to suffer from doing so, *officium suum nemini debet esse damnosum*. It is an absurdity to suppose that the creditor, who spares his debtor, should thereby be placed in a worse condition than if he had proceeded with rigour against him. (a)

(a) This last reasoning shews the absurdity of the principle adopted in *France*, and in most *Roman Catholic* countries, of prohibiting all agreements for receiving a compensation on the loan of money. The present use of money is, in the intercourse of society, as beneficial as the use of any other commodity: and the transferring of that benefit from one person to another, is as naturally the object of a legitimate compensation as any other communication of property or service; but the misapplication of scriptural authority proscribes as oppressive and injurious a contract which in its nature is mutually beneficial.

It is taken for granted, that loans of money ought to be gratuitous acts of liberality ; but, in the general intercourse of society, it is much more advantageous to allow particular individuals a right to exercise their own judgment, as to what will be conducive to their interest, than by the semblance of protection to prevent their obtaining that assistance at all which they might have obtained upon a compensation, that they admit to be not more than adequate to the benefit which they derive from it. What is in its nature an act of commerce, is confined by law to an act of friendship, and if that motive does not operate, a man who might be saved from ruin by temporary assistance duly compensated for, is involved in that ruin by the very means injudiciously appointed for his protection.

Another part of the *French* system is founded upon much more rational principles, and such as it would not be injudicious to adopt elsewhere, viz. that a debtor shall be liable to interest from the time of instituting a judicial demand against him.

In *England*, it is generally in the discretion of a jury to allow interest for the detention of a debt, but it is a discretion very seldom exercised, except under circumstances of particular aggravation.

In the case of *Walker v. Constable*, 1 Bos. & Pul. 306, it was held that, in an action for money had and received, nothing more could be recovered than the original sum without interest ; but this determination seems rather to be founded upon an implicit acquiescence in the doctrines incidentally accompanying a former adjudication, than on an accurate examination of those principles of rational jurisprudence upon which that action so peculiarly depends.

P A R T II.

Of the different Kinds of Obligations.

C H A P. I.

General Exposition of the different Kinds of Obligations.§ I. *First Division.*

[173] **T**HE first division of Obligations is derived from the nature of the lien which they produce. Obligations considered in this respect are divided into Obligations, which are both natural and civil ; Obligations merely civil, and Obligations merely natural.

A civil Obligation is a legal tie, *vinculum juris*, which gives the person, in whose favour it is contracted, a right of judicially enforcing the performance of it.

A natural Obligation is that which obliges the person contracting it in honour and conscience.

[174] Obligations are commonly both civil and natural : there are however some which are merely civil, and which the debtor may be judicially compelled to perform, without being under any Obligation to do so in point of conscience.

Such is the Obligation arising from a judgment founded on a mistake of law or fact, and from which there is no appeal : the person who is condemned is obliged to pay the amount of the condemnation, and may be judicially compelled to do so, although he does not owe it in truth and conscience ; the Obligation merely results from the authority of the judgment.

[175] There are also Obligations which are merely natural, without being civil. These Obligations oblige the person contracting them in point of honour and conscience, but the law does not allow any action to compel the execution of them.

These are only called Obligations in an improper sense, for they are no legal tie, *vinculum juris* ; they do not impose upon the person contracting them any real necessity to accomplish them, as he cannot be compelled to do so by the person in whose favour they are contracted ; and it is this necessity which constitutes the character of Obligation : *vinculum juris, quo necessitate adstringimur* : they are only *pudoris et equitatis vinculum*.

We shall treat in particular of this kind of Obligation in the following chapter.

§ II. Second Division.

[176] The second division of Obligations is derived from the manner in which they may be contracted; they are divided into such as are pure and simple, and such as are conditional.

Pure and simple Obligations are those, which are not suspended by any condition; whether they have been originally contracted without any condition, or whether the condition upon which they were contracted is accomplished.

Conditional obligations are those which are suspended by a condition under which they were contracted, and which is not yet accomplished.

[177] Pure and simple obligations, in a more confined sense, are those which are contracted without any modifications; such as a resolutive condition, a limited time for the continuance of the obligation, time and place for payment, a liberty of paying to another person instead of the creditor; that of paying any other thing instead of that which is the object of the obligation, an alternative between several things which are the objects of the obligation,

All these modifications are so many different kinds of Obligations, of which we shall treat in the 3d Chapter.

§ III. Third, Fourth and Fifth Divisions.

[178] These divisions are derived from the quality of the different things, which are the object of the Obligation.

There are obligations to give, and obligations to do some act, *stipulationum quædam in dando, quædam in faciendo, l. 3. ff. de. v. Obl.* The latter also include those by which a person is obliged not to do any thing.

There is this difference between obligations, for giving and for doing any thing; that the person who is obliged to give a particular thing, may, when it is in his possession, be precisely constrained to give it; the creditor may, in spite of the debtor, be put in possession of it by the authority of justice; whereas the person who is obliged to perform any act cannot be precisely constrained to do so, but in default of fulfilling the obligation it is converted into an obligation for paying the damages arising from the non-performance,

manco, and these damages consist in the sum of money at which they are liquidated, and estimated by experts named by the parties or the judge.

[179] Obligations or debts are further distinguished into liquidated and unliquidated; liquidated debts are those which consist in a certain thing, *obligatio rei certe*. Gaius gives this definition of them, *certum est quod ex ipsa pronuntiatione apparet, quid, quale, quantumque sit*. l. 74. ff. de verb. Obl. such are debts of a specific thing, or of a certain quantity of corn, wine, &c.

An unliquidated debt is, when the thing or sum due is not yet ascertained, *ubi non apparet quid, quale, quantumque est in stipulatione*. l. 75. ff. dict. tit.

Such are damages until they are liquidated, and consequently all such obligations as consist in doing or not doing any thing, d. l. 75. § 7. (a) since they are resolvable into obligations of damages, debts of an indeterminate thing, and alternative debts, until the debtor has made his choice, are also unliquidated debts, d. l. 75. § 1. (b) § 8. (c)

There are several differences between liquidated debts and those which are not so. The creditor of a liquidated debt, when he has an executory title, may proceed by commandment and seizure of the goods of his debtor; the creditor of an unliquidated debt cannot; (d) the credit of a liquidated sum may be opposed in compensation to another liquidated debt; a credit not yet liquidated cannot be opposed in compensation.

[180] Obligations are further divided into obligations of a specific thing, and obligations of an indeterminate thing, of a certain kind, which is called *obligatio generis*.

We shall treat professedly of these obligations, in the first section of chap. 4th.

[181] Lastly, obligations are divided into divisible and indivisible, according as the thing which is due is susceptible,

(a) Qui id quod in faciendo aut non faciendo stipulatur incertum stipulari videtur, in faciendo, veluti fossam fodiri, domum ædificari, vacuam possessionem tradi; in non faciendo, veluti per te non fieri quominus mihi per fundum tuum ire, agere, liceat, per te non fieri, quominus mihi hominem Erotem habere liceat.

(b) Ergo si qui fundum sine propria appellatione vel hominem generaliter sine proprio nomine aut vinum frumentumve sine qualitate dari sibi stipulatur, incertum deducit in obligationem.

(c) Qui illud aut illud stipulatur veluti decem vel hominem Stichum, utrum certum an incertum deducat in obligationem non immerito queritur; nam & res certæ designantur: & utra earum potius præstanda sit, in incerto est, sed utcumque is [qui] sibi electionem constituit adjectis his verbis, utrum ego velim, potest videri certum stipulatus cum ei liceat vel hominem tantum vel decem tantum interdare sibi dari oportere, qui vero sibi electionem præfixit, incertum stipulatur.

(d) This is obviously a mere technical positive distinction.

or not susceptible, of at least intellectual parts : we shall treat professedly of this distinction, chap. 4. § 2.

§ IV. Sixth Division.

[182] Obligations are divided into principal and accessory ; this division is derived from the order of things which are the object of them.

The principal obligation is that, which forms the principal object of the engagement contracted between the parties.

Accessory obligations are those, which are in a manner the consequences and dependencies of the principal obligation.

For instance, in the contract for the sale of an estate, the principal obligation which the seller contracts, is that, of delivering the estate to the purchaser, and of warranting it against all trouble and evictions, *obligatio præstandi emptori rem habere liceri*, the obligation of delivering the titles and instruments relating to the estate ; that of using good faith in the contract, and a proper care in the preservation of the thing sold, are accessory obligations.

These terms of principal and accessory obligations, are also taken in another sense, as we shall see *infra*, § 6.

§ V. Seventh Division

[183] Obligations are distinguished into primary and secondary ; and this division is derived from the order in which they are supposed to be contracted.

The primary obligation is that, which is contracted principally in the first place, and on its own account.

The secondary obligation is that, which is contracted in case of the non-performance of a primary obligation.

For instance, in the contract of sale, the obligation which the seller contracts to deliver and warrant the thing sold, is the primary obligation ; that of paying the buyer damages, in case of inability to deliver or warrant the thing, is a secondary obligation.

[184] There are two kinds of secondary obligations.

The first consists of those which are only a natural consequence of the primary obligation ; which, without the intervention of any particular agreement, naturally arise from the mere non-performance of the primary obligation, or from the delay in performing it.

We may state as an instance, the obligation of damages into which the primary obligation contracted by the seller to deliver or warrant

warrant the thing sold, is naturally and of right converted in case of non-performance, and likewise the obligation of interest which arises from a delay in performance of the obligation, to pay a certain sum of money.

The secondary obligations of the second kind are those, which arise from a particular clause, by which the party who enters into an engagement promises to give a certain sum, or other thing, in case he does not satisfy his engagement.

These clauses are called penal clauses, and the obligations which arise from them penal obligations, which are accessory to the primary obligation, and are contracted to assure the execution thereof. We shall treat of them professedly in chap. 5.

[185] Secondary obligations may be further subdivided into two kinds.

There is one kind of secondary obligations, into which the primary obligations are entirely converted when they are not executed; such is the obligation of damages already mentioned. When a seller does not satisfy his primary obligation, of delivering or warranting the thing sold, this primary obligation is entirely converted into the secondary obligation of paying damages; and the secondary obligation is substituted for the first, which no longer subsists (a).

There is another kind of secondary obligations which only accede to the primary obligation without destroying it, as is the case when the seller is guilty of delay in the performance; such is the obligation of interest, which arises from a default in payment of the principal sum.

§ VI. Eighth Division.

[186] Obligations, considered with reference to the persons who contract them, are divided into principal and accessory.

The principal obligation in this sense, is that of the person who obliges himself on his own account, and not for another.

Accessory obligations are those of the persons who oblige themselves for another, such as sureties, and all those, which belong to the obligation of another. Of these we shall treat in Chap. 6.

[187] [188] [189] [190] There are other divisions noticed by *Patbier*, which are merely applicable to the course of judicial proceedings, according to the law of *France*.

(a) If the seller retains the property, and the delivery of it can be specifically enforced, this illustration will not be strictly applicable.

C H A P. II.

Of the first Division of Obligations into civil and natural.

[191] We have hitherto sufficiently seen the nature of civil obligations: it remains in this chapter to treat of natural obligations.

The principles of the law of *France* are, in this respect, different from those of the *Roman* law.

In the *Roman* law, that was called a natural obligation which was destitute of an action; that is to say, which did not give the person in whose favour it was contracted, a right of judicially enforcing the payment of it.

Such were all those which arose from simple agreements, which were neither invested with the quality of a contract, nor the form of a stipulation.

These obligations were very favourable, *quid enim tam congruum fidei humane, quam ea, quæ inter eos placuerunt servari?* l. 2. ff. de pact. If they were destitute of an action, it was only for a reason derived from the policy of the patricians; who for their own private interest thought proper to make the right of action depend upon certain forms, of which they alone had originally the cognizance, for the purpose of obliging the plebeians to have recourse to them in their affairs, and in order thereby to hold them in dependance. Therefore, although they were destitute of an action, they had all the other effects of a civil obligation; not only was the payment of what was due by a purely natural obligation valid, and not subject to repetition, but I might oppose by way of compensation or set-off, to the action of my creditor, what was due from him to me by an obligation purely natural, l. 6. ff. de compens. (a). According to the same principle sureties might contract a civil obligation, which was accessory to an obligation purely natural, l. 16. ff. § 3. ff. de fidei. (b) And an obligation, purely natural, might serve as matter for a novation of a civil obligation, l. 1. § 1. ff. de novat. (c).

According to the principles of the law of *France*, which does

(a) Etiam quod naturâ debetur, venit in compensationem.

(b) Fidejussor accipi potest, quotiens est aliqua obligatio civilis cui applicetur.

(c) Novatio, * est prioris debiti in aliam obligationem vel civilem vel naturalem transfusio atque translatio: hoc est, cum ex præcedenti causa ita nova constituitur, ut prior perimatur, novatio enim a novo nomen accipit & a novâ obligatione, § 1. Illud non interest qualis processit obligatio: utrum naturalis an civilis, an honoraria & utrum verbis, an re an consensu; qualiscunque igitur obligatio sit, quæ processit novari verbis potest: dummodo sequens obligatio aut civiliter teneat, aut naturaliter; ut puta, si pupillus sine tutoris auctoritate promiserit.

* [See Part III. c. 2.]

not admit of the distinction in the *Roman* law between contracts and simple pacts, the natural obligations of the *Roman* law are real civil obligations.

The obligations which may be called purely natural, are those to which the law denies a right of action, on account of a disfavour of their consideration, such as the debt due to a tavern-keeper for expences contracted in his tavern, by a person resident in the same place.

2d. Those which arise from the contracts of persons, who having judgment and discretion sufficient to enable them to contract, are, notwithstanding, incapable of contracting by law; such is the obligation of a woman who being under the authority of her husband, has contracted without being authorized.

[193] These obligations, which arise from a cause discountenanced by the law, or which are contracted by persons who are not allowed by the law to contract, would not by the *Roman* law have even the name of natural obligations. Therefore I do not think they ought to have the same effect with us, which was given by the *Roman* law to obligations purely natural.

For instance, a tavern-keeper ought not to be allowed to oppose against the action of his creditor, what the creditor owes him for expences incurred in his tavern. The debtor of a married woman cannot, in an action brought by her, oppose the compensation of what she owes to him, by a contract made without the authority of her husband (a).

In like manner, sureties do not contract a valid obligation to a tavern-keeper; for the disfavour of the consideration, which causes a right of action to be withheld from the tavern-keeper, applies as strongly to the sureties as to the principal (b).

When the law annuls the obligation merely on account of the quality of the person, as when a married woman obliges herself without the authority of her husband, there would be more room to doubt whether an action ought to be denied against the sureties: for the reason, for which the law denies an action against her, is personal to herself; nevertheless it must be decided, that the obligation of the sureties is not more valid than that of the wife: for, as the law renders the obligation of the wife valid, it does not subsist in any manner except in point of conscience; the civil law disallows it, and declares it to be void, and consequently it cannot be a sufficient subject for other obligations to accede to. If, according to the principles of the *Roman* law, sureties might accede

(a) It is very clear that according to the law of *England*, nothing can be the subject of a compensation, (or set off) which cannot be the subject of an action.

(b) This principle would clearly be applied to analogous cases, by the laws of *England*.

to a natural obligation, it was because natural obligations were not disapproved by the law, but were merely destitute of a right of action. But the *Roman* laws decide, that sureties cannot contract a valid obligation on behalf of a woman, who should enter into an engagement against the prohibition of the *senatus consultum Velleianum*, (a) *qui a totam obligationem senatus improbat*, l. 16. § 1. ff. ad sect. Vell. l. 14. cod. dict. tit. For the same reason it ought to be decided, that sureties cannot accede to the obligation which a married woman contracts without being authorized, nor to any other obligations which are only called purely natural, because they are disapproved by the civil law (b).

[195] The only effect of purely natural obligations is, that when the debtor has made a voluntary payment, such payment is valid, and not subject to repetition, because the discharge of a conscientious duty was a just cause of paying in. So that it cannot be said that it was made *sine causa*; whence it follows that in such case there can be no ground for the actions, which are called *condictio indebiti* & *condictio sine causa*.

Observe, however, that a payment made by a woman of a debt, contracted without the authority of her husband, can only be valid if it is made after she becomes a widow, or else by the authority of her husband, if she still continues under his power; for she is no more capable of paying without the authority of her husband, than she is of contracting.

[196] We have hitherto spoken of obligations, which the disfavour of their cause, or the inability of the person contracting them, renders purely natural. A civil obligation, when the debtor has acquired some bar against the action resulting from it, such as the authority of a judgment, or the lapse of time requisite to form a prescription, may be regarded as a purely natural obligation. See *infra*, p. 3. c. 8.

[197] We must not confound the natural obligations spoken of in this chapter, with the imperfect obligations mentioned in the beginning of this treatise. The latter gives no person any right against us even in point of conscience.

(a) *Velleiano senatus consulto plenissime comprehensum est. Ne pro ullo feminae intercederent.* ff. 16. tit. 1.

(b) Here I apprehend that the law of *England* would certainly adopt a different determination. Wherever the original contract is disallowed from a disapprobation of the cause, it is highly reasonable that an effect shall not be allowed to be produced circuitously, which cannot be produced directly; but where there is a mere inadequacy in an individual to make a valid engagement, and there is nothing reprehensible in the engagement itself; there is no reason for invalidating an undertaking by a person not affected by a legal inability to assure the performance of an act constituting a natural obligation in another; as if goods should be sold to a person under age, and a person of full age should in his default engage to pay for them.

For instance, if I have failed to render my benefactor a service, which gratitude should oblige me to perform, what he suffers from a failure in this duty, does not therefore render him my creditor, even in point of conscience. Therefore, if he owed me a sum of money, for which I had no action against him in consequence of the lapse of time, he would still be obliged in point of conscience to pay me, without deducting any thing on account of what he had suffered from my ingratitude. On the contrary, the natural obligations, of which we have treated in this chapter, give the person in whose favour they are contracted a right against us, not indeed in point of law, but in point of conscience. Therefore, if I have contracted a debt of five pounds at a tavern, in the place where I reside, the tavern-keeper is my creditor of that sum in point of conscience; and if I have on my side a credit against him, of the like sum, which is barred by length of time, he may conscientiously excuse himself from paying it, by placing it in compensation against the credit which he has against me.

C H A P. III.

Of the different Modifications under which Obligations may be contracted.

A R T I C L E I.

Of Suspensive Conditions, (a) and Conditional Obligations.

[198] A conditional obligation, is that which is suspended by the condition under which it was contracted, and which is not yet accomplished.

To understand what is a conditional obligation, we shall see, 1st. What is a suspensive condition, and what are the different kinds of conditions: 2d. What may make a suspensive condition: 3d. When a condition is accomplished, or considered as accomplished: 4th. We shall treat of the indivisibility of the accomplishment of conditions: 5th. Of the effect of conditions: 6th. We shall see whether it is necessary, when the obligation has been contracted upon several conditions, that they should all be accomplished in order to give effect to the obligation.

(a) These, in the law of *England*, are distinguished by the term of conditions precedent.

§ I. *What a Condition is, and its different Kinds.*

[199] A condition is the case of a future uncertain event, which may or may not happen, and upon which the obligation is made to depend.

[200] Conditions upon which an obligation may be suspended, are divided into positive and negative.

A positive condition consists in the case where a thing that may or may not happen, shall happen, as *if I marry*.

A negative condition is that, which consists in the case where something, that may or may not happen, shall not happen, as *if I do not marry*.

[201] Conditions are also distinguished into potestative, casual, and mixed.

A potestative condition is that, which is in the power of the person in whose favour the obligation is contracted; (a) as if I engage to give my neighbour a sum of money, in case he cuts down a tree which obstructs my prospect (b).

A casual condition is that, which depends upon accident, and is no wise in the power of the creditor, as *if such a ship shall arrive safe*.

A mixed condition is that, which depends upon the concurrence of the will of the creditor, and of a third person; as *if you marry my cousin*.

§ II. *What may make a Condition which suspends an Obligation.*

[202] For a condition to have the effect of suspending an obligation, it is necessary, 1. That it should be a condition of something future; an obligation contracted under the condition of any thing that is past, or present, is not properly a conditional obligation. For instance, if after the lottery has begun to be drawn, and before an account of it is received, I promise a person to give him a certain sum in case I have the first drawn ticket; or if I promise a certain sum in case the Pope is now living, these obligations are not conditional, but they have at first their full perfection, if it appears that I really have the first drawn ticket, or that the Pope is living; or on the contrary no obligation is contracted if it appears that I have not the first drawn ticket, or that the Pope is dead.

This is decided by the law, 100. ff. *de verb. Obl. Conditio in præteritum, non tantum in præsens tempus relata, statim aut perimit obliga-*

(a) As to a condition in the power of the debtor, see post. 205. 2.

(b) As to the conditional natural, of mutual agreements, see Appendix, N^o. VII.

tionem, aut omnino non differt, adde l. 37, 38, 39. ff. de R. Cred. (a). Nevertheless, although the thing be really due, the creditor cannot demand it until he has ascertained the fact, and notified it to the debtor (b).

[203] It is necessary, 2d, that the condition be something, which may or may not happen. The condition of a thing, which certainly will happen, is not properly a condition, and does not suspend the obligation, but only defers the right of demanding the performance of it, and is merely equivalent to a term of payment (c).

[*Pathier here makes a distinction between contracts and legacies, and shews that, according to the civil law, a legacy given to take effect upon future events does not attach, unless the event happens in the life of the legatee.*]

[204] For a condition to be valid, and to suspend an obligation, it must be something possible, lawful, and not contrary to good manners.

The condition of any thing impossible, unlawful, or contrary to good manners, under which a promise is made, renders the act absolutely void, when it is in *faciendo*, and there is not any obligation *l. § 11. ff. (d). de Ob. & Act. l. 31. dict. tit. (e). l. 7. ff. de v. Obl. (a) as*

(a) *L. 37. Cum ad præsens tempus conditio confertur, stipulatio non suspenditur, & si conditio vera sit, stipulatio tenet: quamvis tenere contrahentes conditionem ignorent; veluti si rex Parthorum vivit centum [millia] dare spondes? Eadem sunt & cum in præteritum conditio confertur. 38. Respiciendum enim esse, an, quantum in natura hominum sit, possit scire eam debitum iri. 39. Itaque tunc potestatem conditionis obtinet, cum in futurum confertur.*

(b) The civilians do not seem to have adverted to an obligation referable to an event, which may either be past or future, as a policy of insurance upon a ship lost or not lost, a promise to pay a sum of money if *John* survives *Thomas*; whereas at the time of the agreement the ship may be lost, or one of the persons may be dead, as was the case in the famous case of the earl of *March* and *Pigott*, 5 *Bur.* 2802. *Mr. Codrington* and *Mr. Pigott*, being at *Newmarket*, engaged (in the phrase of the place) to run their fathers. The odds of the bet were computed according to their respective ages, and the plaintiff to lose the bet of *Mr. Codrington* off his hands. The defendant gave the plaintiff a note, as follows; I promise to pay 500*l.* if my father die before Sir *William Codrington*. *Mr. Pigott's* father had died that morning in *Shropshire*, and it was ruled that the plaintiff was intitled to recover. But in the notion under which the term is now considered, the obligation would not in these cases be conditional; the term *conditional* being only applied to the effect of *suspending* the obligation, it would be merely *uncertain* whether it were conditional or absolute.

Upon the necessity of notification, I think the *English* law would adopt the opposite rule to that which is here stated, and require the party obliged to apprize himself of the fact; and that an action commenced before the event was or could be known, might be sustained, provided it appeared at the trial the event had taken place at such commencement.

(c) Upon this principle it is held that though a bill of exchange upon a condition is void, a bill to pay on the death of any person is good.

(d) Item [sub] impossibili conditione factam stipulationem constat inutilem esse

(e) Non solum stipulationes impossibili conditione adplicate nullius momenti sunt;

(a) as if I promise you a sum of money upon the condition of your making a triangle without angles, or going naked in the streets.

It is otherwise in testaments ; and legacies, given under such conditions would be valid, and the condition would be regarded as if it was not inserted (b).

When the impossible condition is in *non faciendo*, as if I promise you a sum of money if you do not stop the course of the sun, it does not render the obligation under which it is contracted void : the condition has no effect, and the obligation is pure and simple, *dist. l. 7. ff. de v. Obl. (c)*. But the condition not to do a certain thing which is contrary to good manners, or to the law, may render the act void, because it is contrary to justice and good faith to stipulate for any thing to abstain from that which we are already obliged to abstain from (d).

[205] For a condition to be valid, and suspend the obligation under which it is contracted, it is necessary that it should

sed etiam cæteri quique contractus, veluti emptiones, locationes impossibili conditione interpositæ, æque nullius momenti sunt, quia in ea re quæ ex duorum pluriumve consensu agitur, omnium voluntas spectetur ; quorum proculdubio in hujusmodi actio talis cogitatio est, ut nihil agi existiment appositæ ea conditione quam sciant esse impossibilem.

(a) Impossibilis conditio, cum in faciendum concipitur, stipulationibus obstat : aliter atque si talis conditio inferatur stipulatione, si in cælum non ascendit, nam utilis & præsens est & pecuniam creditam continet.

(b) There is not any distinction of this kind in the law of *England*.

(c) This accord. with the doctrine of *Co. Lit. 266*. That if the obligation of a bond be impossible at the time of making the condition, the obligation is single ; as if a man be bound in an obligation, with condition, that if the obligor do go from *Westminster* to *Rome* within three hours, the obligation shall be void. Here the condition is void and impossible, and the obligation stands good. And the law is the same in case of a feoffment in fee, with condition subsequent (which is called by *Pothier* a resolutive condition), the estate is absolute, and the condition impossible and void.

But in this respect there is a distinction between a condition of this kind that is precedent, (or in the language of *Pothier*, suspensive), and such a condition subsequent ; for in the former case no estate or interest will grow upon it ; as if a man make a lease for life, upon condition that if the lessee go to *Rome* as aforesaid, then he shall have a fee ; here the condition precedent is impossible and void, and therefore no fee simple can grow to the lessee.

The considerations of conditions originally possible, becoming afterwards impossible without the default of the party, is principally referable to resolutive or subsequent conditions and penal obligations ; for it is clear that if a precedent (or suspensive) condition becomes impossible, the obligation attached to the performance of it can never arise, unless the impossibility is occasioned by the party obliged, in which case the effect is the same as if the condition had been accomplished.

(d) I conceive that such conditions may be valid, or otherwise, according to a variety of circumstances ; if they in any degree partake of extortion, or are a cloak for illegality, there can be no doubt of their annulling the obligation. But there can be no objection to making a promise depend upon the continuance or renewal of good conduct, as to pay a relation a sum of money if he abstains from the gaming-table, to secure an annuity to a young woman if she does not renew an illicit connection.

not

not destroy the nature of the obligation (a). Such is the condition which should make the obligation depend upon the pure and simple will of the person who is engaged; as if I should promise to give a thing in case I please: for an obligation being *juris vinculum quo necessitate adstringimur*, and essentially including a necessity to give or to do something, nothing is more contrary to its nature than to make it depend upon the mere will of the person who is supposed to contract it; and consequently such a condition does not suspend, but destroy the obligation, (b) which is defective in this case for the want of lien, of which we have already spoken. No. 47, 48, *nulla promissio potest consistere quæ ex voluntate promittentis statim capit*, l. 108. § 1. ff. de verb. Obl.

It is contrary to the essence of an obligation, that it should depend upon the pure and single will of the person who is supposed to have contracted it, but it may depend upon the pure and single will of a third person; therefore I may effectually contract an obligation to give or do some thing, if a third person consents to it, l. 43, & 44. de verb. Obl. (c).

§ III. When a Condition is accomplished, or considered as accomplished.

[206] Positive conditions are accomplished, when the thing which is the subject of the condition arrives.

When a condition consists in giving or doing something, it is necessary for its accomplishment, that the person upon whom it is imposed should give or do the thing prescribed, in the manner

(a) In the law of England, there are frequent references to the invalidity of a condition, repugnant to the nature of the act, as a gift in tail, with a condition not to suffer a recovery.

(b) But though an obligation cannot depend upon the pure and simple will of the debtor, it may depend upon his doing or not doing a particular act, which act depends upon his own unqualified will. As if a person engages to pay another 1000*l.* in case he practises as a surgeon within 20 miles of *Liverpool*. A case of this kind is referred to by *Pothier*, *supra* No. 48.

(c) L. 43 Si quis arbitratus (puta) Lucii Titii restitui sibi stipulatus est, deinde ipse stipulator moram fecerit; quominus arbitretur Titius: promissor, quasi moram fecerit, non tenetur. Quid ergo, si ipse, qui arbitrari debuit, moram fecerit? magis probandum est, a persona non esse recedendam ejus, cujus arbitrium insertum est, l. 44 Et ideo si omnino non arbitretur, nihil valet stipulatio; adeo ut & si pœna adjecta sit, ne ipsa quidem committatur.

The case of *Worsley v. Wood*, in error, 6 T. R. 750, is an instance of the application of this principle. It was a condition in a policy of Insurance of the Phoenix Fire Office, that the minister and churchwardens of the parish should certify, that they were acquainted with the character, &c. of the assured, and it was determined that without such certificate the company were not liable. Mr. Justice Lawrence said, if the refusal by the minister and churchwardens were a wrongful act, the cases are uniform to shew that if a person undertakes for the act of another, that act must be done.

which was probably intended by the parties. Therefore, if I had contracted some engagement with you, in case of your giving a sum of money to such a one who is a minor, you do not accomplish the condition, if, instead of giving the money to his tutor, you give it to the minor himself, who has dissipated it. For it is evident that my intention in imposing this condition was, that you should give the money to the minor in such a manner that he should profit from it, by placing it in the hands of his tutor; and not that you should abandon it to his own discretion (a).

Our principle, that conditions ought to be accomplished in the manner that was probably intended by the parties, serves to decide the question made by the doctors, whether conditions ought to be accomplished literally *in forma specificā*? The answer is, that commonly they ought to be accomplished *in forma specificā*; but they may nevertheless sometimes be accomplished *per equipollens*, when from the subject matter it appears that such was probably the intention of the parties: and this intention is presumed, when the person, in whose favour the condition is made, has no interest in its being accomplished in one manner rather than in another.

For instance, if I contract some obligation in your favour upon this condition, that if within such a time you give me five guineas; you are held to accomplish this condition by giving me 105 shillings, it being indifferent to me whether I receive the amount in silver or gold; and the rather, because in respect of money the value ascribed to it by the state, and not the particular substances, which are the signs of that value, is the object of consideration. *Arg. l. 1. in fin. ff. de Contr. Empt. (b).*

As

(a) If there is a covenant or condition, to leave all timber on the land, it is a breach in the tenant to cut down the trees, though he leave them. *Sir T. Raym. 464* If a party after contracting for the sale of an estate falls the timber, he cannot maintain an action to compel the purchaser to perform the contract. *Semble, Duke of St. Alban's v. Shore. 1 H. Bl. 270.*

(b) *Quia non semper, nec facile concurrebat, ut cum tu haberes, quod ego desiderarem, invicem haberem, quod tu accipere velles, electa materia est, cujus publica ac perpetua estimatio difficultatibus permutationum, æqualitate quantitatis subveniret; ea [que] materia forma publica percussa usum dominiumque non tam ex substantia præbet, quam ex quantitate.*

In the case of *Worsley v. Wood*, mentioned above, (note to 205) Mr. Justice Lawrence observed, that there are some cases in the books respecting conditions precedent, where the thing agreed to be done was in effect performed; though not in the exact manner, it was deemed a substantial performance: as, where the condition was to enfeoff, a conveyance by lease and release has been deemed a compliance. So if the condition be to deliver the will of the testator, and he delivers letters testamentary. *1 Rol. Abr. 426. fol. 2. 4.* But this [viz. the certificate of other persons instead of the minister and churchwardens], instead of being a substantial performance of the condition, is only a substitution of one thing for another.

In *Dorington v. East, Yelv. 87.* the plaintiff declared, that in consideration that he
should

[207] As conditions ought to be accomplished in the manner which the contracting parties intended, it becomes a question when the condition consists of some act, whether of the creditor or of the debtor of a third person, whether it can only be accomplished by that particular person, or whether it may be done by his heirs, or by any other in the name, and on the behalf of the person imported by the condition. The decision of the question depends upon the nature of the fact, and upon the examination of the intention of the contracting parties. If the fact, which is the object of the condition, is personal, if it is the act of a particular person, (a) rather than the mere act itself, which the parties had in view, the condition can only be accomplished by that person. For instance, if I agree with my servant to give him a certain recompense in case he continues with me ten years, it is evident that his service is a personal act, which can only be accomplished by himself. So with respect to the obligation with a pupil of a celebrated painter, to give him a certain sum if his master paints a certain picture for me, this is also a personal act, and can only be accomplished by the painter himself.

But if the act, whether of the creditor or debtor, or a third person, which is interposed as a condition, is not a personal act; if it is considered by the contracting parties merely as an act in itself, and not as the act of a particular person, the condition may be accomplished, not only by the person himself, but also by his heirs, or other successors. For instance, suppose I engage to pay you a sum of money, if you in the course of the year cut down a wood on your land, which keeps the sun from my vines; this condition may be accomplished by your heirs, for the act is not personal to yourself. It is evident, that in attaching this condition to my obligation, I consider the act alone, and in itself, having no other intention than that the wood shall be removed, and it being indifferent to me by whom it is done. So if I buy an estate from you upon condition

should procure the defendant six pound for a year, the defendant promised to make him a lease, and that on the 23d of April, he procured J. S. to lend three pound for a year, and on the 24th of June he procured J. D. to lend three pound for a year, which was holden insufficient, for it was the intent of the parties that the defendant should have the benefit of six pound for an entire year; and it was said that if the consideration had been to have lent the defendant 20*l.* in gold, and it appeared that 10*l.* of it had been lent in silver, although the substance of the matter was performed, it did not agree with the letter, which being specific and express, ought to direct the construction.—And it is certain, that according to the principles of reason, one thing may be so specifically expressed as the condition of the agreement, as not to admit of an equivalent performance, even though such equivalent might, in case of a general expression, be allowed as sufficient.

(a) Such was the case in *Worsley and Wood*, mentioned in the notes to the two preceding numbers.

that such a one shall give up an easement which he claims upon it, the condition is accomplished, if it is given up by his successor (a).

[208] Conditions of contracts, by which we engage, as well for ourselves as for our heirs, may be accomplished as well after the death of the person, in whose favour they are contracted, as during his life. In this respect contracts differ from legacies, and other similar dispositions, which become void if the person in whose favour they are made dies before the condition upon which they depend is accomplished.

The reason of the difference is, that the party giving the legacy only regards the person of the legatee. Hence it follows, that the accomplishment of his condition, which only takes place after his death, cannot give a title to the legacy; for it cannot arise for the benefit of the legatee, who is no more, nor for the benefit of his heirs, who are not the persons that were intended by the testator as the object of his bounty; on the contrary, in contracts, the person who stipulates any thing is held to stipulate both for himself and his heirs. The obligation is contracted in favour both of himself and his heirs; whence it follows, that the condition under which the obligation is contracted, although not accomplished till after his death, gives a right to demand the performance of the obligation (b).

Cynus, Bartholus, and most of the ancient doctors, have maintained that our principle concerning the accomplishment of the conditions of contracts, is subject to exception in respect of potestative conditions, that is to say, of those which consist in some act

(a) In *Fowler v. Samwell*, 1 Str. 653, the defendant signed an agreement in the following terms. Received from *Richard Nichols* and Co. 4500*l.* which I promise to pay on his transferring me 550*l.* South Sea Stock. On an action brought by the surviving partner of *Nichols*, it appeared that the tender of the stock was made after *Nichols's* death: And Lord *Raymond*, at *Nisi prius*, was of opinion that it being tied up to a tender by *Nichols*, (who had time during life, if not hastened by request), no tender after his death could make this an absolute debt recoverable upon an *indebitatus assumpsit*. This doctrine is in opposition to the text of *Potbier*. I cannot forbear adding, that it appears no less opposite to the plain reason and justice of the case.

(b) This distinction is not in general allowed in the *English* law. If the conditional legatee survives the testator, the property vests in him subject to the condition, and is transmissible and disposeable. Where a legacy is charged upon a real estate, and the payment is postponed, the legacy fails by the death of the legatee in the mean time, unless it appears that the postponement of the payment was for the convenience of the estate, in which case it attaches. But such failure does not take place in case of the devise of the estate itself. There are several cases respecting the point, whether a testamentary disposition to take effect at a certain age does or does not become void, by the party dying before that age; but these are all referable to the question of intention, whether the attainment of the age should be a condition or a denotation of time. The general view of that subject is very ably taken by Sir *William Grant*, Master of the Rolls, in the case of *Hansen v. Graham*, 6 Ves. 239.

which

which is in the power of the person in whose favour the obligation is contracted. These authors contend, that they cannot be accomplished after his death. If this decision were restrained to potestative conditions, which consist in some personal act of the creditor, it could not be attended with any difficulty. It is evident, from what has been already said, that such conditions cannot be accomplished after his death; but it is false, that all potestative conditions, indiscriminately, cannot be accomplished after the death of the creditor, and there is no solid reason upon which the opinion of these doctors can be established. They only found it upon some texts of the law, which are by no means decisive, and which it would be too tedious to mention and refute; it will be sufficient to answer the law, 48. ff. de verb. Obl. (a) which is the principal foundation of this opinion. It is there said, that in a stipulation, these terms *cum petiero dabis*; are different from those *si petiero*, and that they do not include a condition, *admonitionem magis quam conditionem habet hæc stipulatio, & ideo*, adds Ulpian, *si decellero priusquam petiero, non videtur defecisse conditio*. From these last words our doctors argue thus: Ulpian says, that when the parties have used these terms, *cum petiero*, the death of the creditor before demand does not prevent the effect of the agreement, because these terms, *cum petiero*, do not include a condition; then say they, if the parties had made use of terms which do include a condition, such as *si petiero*, it would have been otherwise, and the death of the creditor, before demand, would have defeated the condition, and destroyed the obligation; then the condition *si petiero*, can only be accomplished with effect in the life-time of the creditor; then potestative conditions can only be accomplished with effect in the life of the creditor. I answer, that the last consequence is ill drawn: these doctors, contrary to the rules of logic, argue from the particular to the general; I agree that the condition *si petiero*, cannot be accomplished after the death of the creditor, because it appears that in this condition it is the personal act of the creditor; it is the demand which he shall individually make, that is intended by the parties as a condition, otherwise the condition would have no meaning: but it does not follow that, because the condition *si petiero* cannot be accomplished after the death of the creditor, therefore other potestative conditions depending upon an act, which is not personal, cannot be accomplished with effect after the death of the creditor. This question is treated at great length by Covarruvias, *Quest Pract.* 39.

(a) Si dicam, cum petiero, dari fuero stipulatus; admonitionem magis quam conditionem, quo celerius reddantur, & quasi sine mora, quam conditionem habet stipulatio, & ideo licet decellero prius, quam petiero, non videtur defecisse conditio.

[209] When the condition includes a specified time, within which it is to be accomplished ; as if I am obliged to give you a certain sum if a particular ship shall arrive in the course of this year, the thing must happen within the specified time, and when that is expired, without its happening, the condition fails, and the obligation contracted upon such condition is entirely at an end.

But if the condition does not include any specific time within which it is to be accomplished, it may be so at any time, and is not held to fail until it becomes certain that the thing will not take place.

There is an exception from this rule, where the condition consists in something which the person, in whose favour I am obliged, ought to do, and which I have an interest in having done ; as if I promise my neighbour a certain sum if he will remove a tree which is injurious to me : for in this case I may assign him to appear, that a time may be prescribed within which he shall accomplish the condition, and that in default of his doing so, I may be discharged purely and simply from my obligation (a).

[210] Negative conditions either have or have not a specified time : when they have such time, they exist as soon as the time is expired, without the thing taking place. For instance, if I promise you something, provided a ship does not return in the course of this year, the condition will exist as soon as the year is expired, without the ship having arrived. They may be accomplished before the expiration of the time, if it becomes certain that the thing will not take place.

If the negative condition has no time specified, it is not deemed accomplished until it is certain that the thing will not take place. (b) For instance, if I engage to give you something, provided a ship does not arrive in safety from the *West Indies*, the condition will not exist until it is certain that the ship will not return ; as by certain intelligence being received of its loss (c).

If,

(a) We have not in *England* any judicial proceeding prescribed for this purpose, though I conceive that a suit in equity might be allowable under the circumstances stated. But it seems to me, that without any suit whatever, if a person engages to pay a sum of money, or do any other act upon the performance of a condition for his interest, and no time is prescribed, the promise will be discharged in case the condition is not performed within a reasonable time after request. *Vid.* the distinctions upon this subject, *Co. Lit.* 208, 209. *Shep. Touch.* 134. 137. *Comyns, Condition.* C. 3.

(b) *Randal v. Payne*, 1 Bro. 55. A testator directed, that if either of certain persons should marry into the family of *Rivington*, and have a son, such son should have his estate ; and if they should not marry into that family, it should belong to another. They all married, but not into the family mentioned ; and it was held that the devise was suspended, as their husbands might die, and they might afterwards marry into the favoured family.

(c) This is only one medium of evidence. The not receiving any intelligence for a length

[211] If, however, the condition consists in something, which is in the power of the debtor, and which interests the person in whose favour the obligation is contracted ; as if a person engages to give me a sum of money in case he does not remove a tree in his land which is injurious to mine, I think he who is obliged may be assigned, and that in default of doing such thing within the time appointed by the judge, he shall be condemned to pay what he had engaged to give, in case he did not do the act. And if he does not do it within the time appointed, this negative condition will be deemed to have existed, and he will in consequence be condemned to pay the sum which he has engaged to pay, under this condition (a). This decision however has not appeared without difficulty to the *Roman* jurists ; the two schools were divided upon the question, *l. 115. § 2. ff. de verb. Obl.* (b) that of the *Sabinians*, which I have followed, appears more conformable to the spirit and simplicity of the *French* law.

[212] It is a rule common to all conditions of obligations, that they be taken to be accomplished when the debtor, who is obliged under such condition, has prevented its accomplishment, (c) *quicumque sub conditione obligatus, curaverit ne conditio existeret nihilominus obligatur, l. 85. § 7 ff. de verb. Obl. Pro impleta habetur conditio cum per eum fiat, qui, si impleta esset, debiturus esset, l. 81. § 1. ff. de*

length of time which can only be accounted for by the supposition of a loss, is equivalent to an account of an actual loss, as is evident from constant experience in respect to policies of insurance.

(a) I conceive that the same consequence, according to the *English* law, would attach, in case of neglecting to do the act within a reasonable time after request.

(b) Item si quis ita stipuletur, si Pamphilum non dederis, centum dare spondes ? Pegasus respondit non ante committit stipulationem, quam desisset posse Pamphilum dari. Sabinus autem existimabat ex sententia contrahentium postquam homo potuit dari, confestim agendum, & tamdiu ex stipulatione non posse agi, quamdiu per promissorem non stetit quominus hominem daret, atque defendebat exempto penus legatæ, [Mucius] etenim heredem, si dare potuisset penam, nec desisset, confestim in pecuniam legatorum teneri scripsit : idque utilitatis causa receptum est ob defuncti voluntatem & ipsius rei natura.

Itaque potest Sabinus sententia recipi, si stipulatio non a conditione cæpit ; veluti, Si Pamphilum non dederis, tantum dare spondes, sed ita concepta sit [stipulatio], Pamphilum dare spondes ? si non dederis, tantum dari spondes ? quod sine dubio verum erit, cum id actum probatur, ut si homo datus non fuerit, & homo & pecunia debeatur ; sed & si ita cautum sit, ut sola pecunia non soluto homine debeatur, idem defendendum erit ; quoniam fuisse voluntas probatur ut homo solvatur aut pecunia petatur.

(c) An instance of the accomplishment of a condition being prevented by the act of the debtor, arose in the case of *Hotbam v. the East India Company*, 1 T. R. 638, upon a provision in a charter-party, stating that nothing should be allowed for short tonnage, unless the same should be certified by the Company's agents, presidents, or chiefs in council, or supercargoes, from which the ship should receive her last dispatches ; and it being found that the plaintiff had taken all proper steps to obtain the certificate, and that the Company's agents having, by their neglect and default, rendered it impossible that the condition could be performed, it was equal to a performance.

In the case of *Worsley v. Wood*, which has already been frequently referred to in the course of the present article, it was admitted, that if the obtaining the certificate had been prevented

ff. de Cond. et Dem. And this is a consequence of the rule of law, *in omnibus causis pro facto accipitur id in quo per alium mora fit*, l. 39. *ff. de R. I.* It may however be said, that it is by the act of the debtor that a condition is not accomplished, and that it ought to be considered as accomplished, when it is only indirectly, and without any intention of preventing its accomplishment, that he has placed an obstacle in the way of it. Therefore *Paulus* says, with respect to conditions attached to legacies: *Non omne ab heredis persona interveniens impedimentum pro expleta conditione cedit*, l. 38. *ff. de Statuliberis.*

For instance, if a testator to whom I succeed leaves you a house, provided that within a year after his decease, you give the creditor of *Peter* a certain sum for which he keeps him in prison, and I being your creditor on my own account for a considerable sum, seize upon your effects to satisfy my debt; although this seizure deprives you of the power of giving the money to the creditor of *Peter*, and of accomplishing the condition of your legacy, I should not hereby be properly held to have prevented the accomplishment, and it would not be taken as accomplished, for it is only indirectly that I have prevented it: this seizure which I have made, was not made with the design of preventing you from accomplishing the condition; I had no other object than to obtain in a lawful manner the money due to me from you.

Observe also in this respect a difference between conditions, the accomplishment of which is momentary, and those which are accomplished by a succession of time. The first are taken to be

prevented by the act of the Insurance Office, it would have been a dispensation from the condition.

If the person, who is under a conditional obligation, discharges the other from executing the condition, it has also been established by our courts to be a sufficient performance; and in the leading case upon the subject, it was held that if one party is ready, and the other stops him on the ground of intention not to perform his part; it is not necessary for the first to go further, and do a nugatory act. *Jones v. Berkeley*, Doug. 684.

But, without such a discharge or refusal, it seems that the party bound to perform the condition must do every thing towards it which can be done, without the concurrence of the other party. Some of the old cases upon the subject seem to carry this doctrine to an unreasonable extreme. The discussion which took place in the case last mentioned, will give the fullest information to those who are desirous of pursuing the subject further. With respect to the nature and effect of mutual agreements to be performed at the same time, see the Appendix to this article. (No. VII.)

In a former case, between Sir *Richard Hotham*, and the *East India Company*, it was held that a charter-party having engaged for the payment of freight on a delivery at the port of *London*, and a delivery at *Margate* having been in the contemplation of the parties substituted for a delivery at the port of *London*, it was a good performance of the condition. Doug. 272.

But where a new agreement is substituted to the original agreement, the plaintiff must take care to frame his declaration according to the fact, and cannot maintain an action upon the first, by shewing a performance of the last. See *Head v. Waithman*, 1 East. 619.

accomplished,

accomplished, as soon as the conditional creditor, having presented himself to accomplish the condition, is prevented by the debtor; it is not so with respect to the others. For instance, if I engage to do something in favour of a husbandman, upon condition he shall do me ten days work, and having offered himself for the purpose, I send him away; the condition is only deemed to be accomplished in part, and as to one day's work, it would only be taken to be intirely accomplished, after he had offered himself on ten different days (a).

With respect to the rule concerning potestative conditions, that they ought to be taken as accomplished, when the accomplishment of them was not in the power of the person, to whom a legacy had been left upon such condition, it is a rule which applies to last wills, and does not extend to contracts. For instance, if a person has left you a certain sum, provided within a year after his decease, you give your slave *James* his freedom, this condition is deemed to be accomplished, and the legacy is due, if the death of *James* takes place a short time after that of the testator, so that you are prevented from executing and accomplishing the condition, *l. 54. § 2. ff. de Leg. 1.* (b) But if a person by an agreement with you, engages to give a sum of money upon the like condition, I think the money will not be due to you, if you are prevented by the death of *James* from accomplishing the condition.

The reason of this difference is, that last wills are susceptible of a more extensive interpretation; on the contrary, contracts ought only to be construed *quantum sonant*, and the interpretation in case of doubt is always made against the person in whose favour the obligation is contracted, *ambiguitus contra stipulatorem est, l. 26. ff. de R. Dub.* because he ought to blame himself if the act is not explicit, as it was in his power, being present, to express it better, *l. 39. (c) ff. de Pact. l. 99. de verb Obl. (d)*. Therefore, according to this principle, when a person contracts an engagement with me, upon condition of my giving freedom to my slave, in a case of

(a) This illustration takes it for granted, that the particular days are at the option of the person who is to do the work. Whether that would be the true construction of a condition expressed in general terms, is a question foreign to the object at present under consideration.

(b) Sed et si servi mors impediisset manumissionem, cum tibi legatum esset, si eum manumisses; nihilominus debetur tibi legatum; quia per te non stetit, quominus perveniat ad libertatem. The principle, that a legacy given upon a condition precedent is due, if the performance of the condition becomes impossible, is not recognized in the law of *England*. See *Roundel v. Carrer*, 2 Bro. Ch. Rep. 67.

(c) Veteribus placet, pactionem obscuram vel ambiguam venditori, et qui locavit, pocere; in quorum fuit potestate legem apertius conscribere.

(d) Quidquid adstringendæ obligationis est, id nisi palam verbis exprimitur, omissum intelligendum est, ac fere secundum promissionem interpretamur; quia stipulatori liberum fuit verba late concipere.

doubt

doubt whether the obligation has been contracted, even where it was not in my power to liberate him, the interpretation ought to be against me, and I am not entitled to demand what was promised me upon this condition, although the death of the slave having taken place before I could accomplish it, has prevented me from doing so. This decision holds good, even where I had already made some preparations, as if I had recalled the slave from a distant place, in order to liberate him before the judge of the place where I reside, and he had died on the road, I could not demand what was promised me on condition of his enfranchisement.

[214] It is the same with respect to the rule concerning mixed conditions. If a person promised me a certain sum in case I marry his cousin, I think that the sum would not be due if I was ready to marry her, and she refused, although if a legacy was given me on such a condition, it would be taken as accomplished, *l. 31. ff. de Cond. (a)*.

§ IV. Of Indivisibility in the Accomplishment of Conditions (b).

[215] The accomplishment of conditions is indivisible, even when the thing which is the object of the condition is something divisible. For instance, if a person has left me an estate

(a) In testamento ita erat scriptum, *Stichus & Pamphila liberi tui: & si in matrimonium ceciderint, heres meus his centum dare damnas esto*: Stichus ante apertas tabulas decessit: respondit partem Stichi defectam esse: sed & Pamphiliam defectam conditione videri, ideoque partem ejus apud heredem remansuram; sed et si uterque viveret, & Stichus nollet eam uxorem ducere, cum mulier parata esset nubere, illi quidem legatum deberetur. Stichi autem portio inutilis fiebat. Nam cum uni ita legatum sit, *Titio si Seiam uxorem duxerit, heres meus centum dato*; si quidem Seia moriatur, defectus conditione intelligitur: at si ipse decedat, nihil ad heredem suum eum transmittere, quia morte ejus conditio defecisse intelligitur; utroque autem vivente, si quidem ipse nollet uxorem ducere, quia ipsius facto conditio defecit, nihil ex legato consequitur; muliere autem nolente nubere cum ipse paratus esset, legatum ei debetur.

A testator gave his estate in trust for his granddaughter, and the heirs of her body, remainder to Comyns, and his right heirs, upon condition that he should marry the granddaughter. Comyns filed a bill offering to marry the granddaughter, which she refused, and soon afterwards married another person, and suffered a recovery. Lord Talbot expressed himself inclined to think that the marriage was a condition subsequent, and that it was dispensed with, partly by the lady's death, and partly by her declaration that she would not marry him; but he decided that the estate was sufficiently barred by the recovery. *Robinson v. Comyns, Temp. Talb. 164*. It is to be observed, that the first part of this opinion, which was merely extrajudicial, is wholly referable to the construction of the condition, as being precedent or subsequent; and does not import any general rule analogous to that of the civil law, that *admitting it to be precedent*, the performance of it was dispensed with by the refusal to marry. It is very difficult to accede to the opinion, that this condition should be construed otherwise than as a condition precedent.

(b) As to the doctrine of apportionment. See Appendix, No. VIII.

in case I give a sum of money to his heir, or if by an agreement of compromise a person engages to leave me an estate, which is in dispute between us in case I give him a certain sum within a given time : although the object of this condition is divisible, nothing being more so than a sum of money, yet the accomplishment of it is indivisible, so far as that the legacy which has been given, or the obligation which has been contracted under such condition will be in suspense until the accomplishment of the whole, without the accomplishment of a part giving any title to a proportionate part of the legacy, or to the performance of a proportionate part of the obligation, *l. 23. (a) l. 56. (b) ff. de Cond. et Demon.* Therefore if a person leaves an estate to *Peter*, on condition of his giving the heir 1000*l.* and *Peter* dies after having given 500*l.* the legacy becomes void for the whole, *d. l. 56.* and the heir of *Peter* can only reclaim the five hundred pounds, *condictione sine causa*, unless the heir of the testator prefers discharging the legacy in part. It is in favour of the heir, that the condition is regarded as indivisible.

It would be the same if the legacy had been given to *Peter*, or in default of him to his children, and *Peter* having died, one of the children had paid the heir his share of the one thousand pounds, the condition would not be deemed in any degree accomplished, and he could not demand any thing until the residue was paid, *d. l. 56.*

It would be otherwise, if the legacy was at first given to two legatees under this condition. The testator having at the first imposed the condition upon two persons, is held to have divided it between them, *d. l. 56.*

[216] *Dumoulin* decides for the indivisibility of the condition in the following case. Four heirs of a debtor are condemned to pay a certain sum, with an allowance of two years for the purpose, provided they give security within a month. *Dumoulin* maintains, that three of the heirs who would have given security for their respective shares within the month, are not to be allowed the benefit of the term, if their co-heir does not in like manner give security for his part. His reason is, that the creditor is in this

(a) Qui duobus heredibus decem dare jussus est [et] fundum sibi habere, verius est, ut, conditionem scindere non possit ne etiam legatum scindatur ; igitur quicumque alteri quinque dederit, nullam partem fundi vindicabit, nisi alteri quoque adeunti hereditatem reliquis quinque numeraverit, aut illo omittente hereditatem tota decem dederit.

(b) Cui fundus legatus est, Si decem dederit, partem fundi consequi non potest, nisi totam pecuniam numerasset ; dissimilis est causa cum duobus eadem res sub conditione legata est. In hac enim questione statim a testamento, quo pluribus conditio apposita est, divisa quoque in singulas personas videri potest. Si ideo singuli cum sua parte et conditioni parere & legatum capere possunt ; nam quamvis summa universæ conditionis sit adscripta, enumeratione personarum potest videri esse divisa ; in eo vero, quod uni sub conditione legatum est, scindi ex accidenti conditio non debet ; & omnis numerus eorum, qui in locum ejus substituuntur, pro singulari personâ est habendus.

case the most favourable party, since he suffers from a term not agreed upon, being allowed to his debtor; whence it follows that the condition upon which the term is granted by the judge, ought to be interpreted in his favour, and strictly against the debtor.

If the fourth heir, instead of giving security for his share, pays it, there is no doubt but that the three others giving security for their respective parts, ought to enjoy the time allowed by the judge, as the creditor has security for every thing that is due to him.

[217] A condition of a legacy is divisible, when the legacy only takes effect in part. For instance, if a person leaves me any thing upon condition of giving a certain sum, and the legacy is reduced one half, because the surplus did not belong to the testator, who nevertheless, believed himself to be the proprietor of the whole, I shall not only not be bound to give more than one half, in order to accomplish the condition, but if I have actually given it, I shall be intitled to repetition, *l. 43. (a) l. 44. § 9. ff. de Cond. et Dem. (b).*

§ V. Of the Effect of Conditions.

[218] The effect of a condition is to suspend the obligation, until the condition is accomplished, or considered as accomplished; till then nothing is due: there is only in expectation that what is undertaken will be due; *pendente conditione nondum debetur, sed spes est debitum iri.* Therefore a payment made by mistake, before the accomplishment of the condition, is subject to repetition, *condictione indebiti, l. 16. ff. de Cond. Indeb. (c).*

(a) Plautius. Rogatus est heres a liberto testatore, ut perceptis sibi decem, totam hereditatem revenderet; postea patronus defuncti honorum possessionem contra tabulas petierat, & partem hereditatis, quæ debebatur, abstulerat. Proculus, Cassius: fidei commissorum pro rata quod solvit repetere debere aiunt, Paulus: hoc jure utimur; nam quemadmodum præstatione fidei commissorum et legatorum heres exoneratur per prætorem, ita etiam ipse partem consequi debet. § 1. Diversum est, si falcidia,* interveniat et minuat legatum, nam his casibus nihil repetitur; gatum in solidum conditioni paretur. § 2. Item sanctitus jus dandi, si is cui lequias est, non potest partem hereditatis sibi relictam, totam capere; nam verius est, partem eam præstare debere, partem illos, qui auferunt ab eo, quod plus relictum est, quam a lege conceditur. § 3. Neratius libro primo responsorum scribit, ex duobus scriptis heredibus, si unus rogatus sit tibi hereditatem restituere, tu Titio certam summam dare, et beneficio legis falcidie in restituendo heres utatur; quanto minus tibi præstiterit, tanto minus te Titio præstare, non esse iniquum.

(b) *L. 44. § 9.* Si pars rei legatæ usucapta sit, an in solidum parendum sit, dubito: et potest dici, pro parte parendum ex sententia testatoris.

(c) Sub conditione debitum, per errorem solum, pendente quidem conditione repetitur, conditione autem existente repeti non potest § 1. Quod autem sub incerto die debetur, die existente, non repetitur.

* A certain portion which could not be left from the heir.

[219] If the thing, which is the object of the conditional obligation, entirely perishes before the accomplishment of the condition, it will be to no purpose that the condition is accomplished afterwards ; for the accomplishment of the condition cannot confirm the obligation which no longer subsists ; for there cannot be any obligation without something which is the subject of it ; but if the thing exists at the time of the accomplishment of the condition, the accomplishment has this effect, that the thing is due in the state in which it is ; if there is any augmentation, the creditor has the advantage of it ; and if there is any deterioration he is subject to the loss arising from such deterioration, provided it has happened without the fault of the debtor, *l. 8. ff. de Peric. et Com. Rei vend.*

[220] This accomplishment of the condition has a retrospective effect to the time when it was contracted, and the right which results from the engagement is deemed to be acquired from the time of the contract, *l. 18. l. 144. § 1. ff. de Reg. jur. (a).*

Hence it follows, that if the creditor dies before the existence of the condition, though he has not yet an absolute right, but only an expectation, nevertheless, if the condition is afterwards accomplished, he will be held to have transmitted to his heir the right of the credit resulting from the engagement contracted in his favour ; because by the retrospective effect of the condition, the right will be held to have been acquired from the time of the contract, and consequently to be transmitted to his heir.

It is otherwise with respect to conditions attached to legacies. The reason of the difference is, that a legacy being only given to the person of the legatee, the condition can only be accomplished for his benefit ; whereas a person who enters into a contract, is deemed to contract on behalf, as well of himself, as of his heirs, and the condition may exist for the benefit of his heirs after his death, *supra, n. 208. Vi. Cujas. ad dict. l. 18. (b).*

(a) *L. 18. Quæ legata mortuis ad heredem nostrum transeunt eorum commodum per nos his, quorum in potestate sumus, eodem casu adquirimus : aliter atque quod stipulati sumus ; nam et sub conditione stipulantes, omnimodo eis adquirimus, etiamsi liberatis nobis potestate domini conditio extat.*

PAULUS.

Si filius familias sub conditione stipulatus emancipatus fuerit, deinde existierit conditio, patri actio competit : quia in stipulationibus id tempus spectatur, quo contrahimus.

L. 144. In stipulationibus id tempus spectatur, quo contrahimus.

(b) This distinction does not prevail in the *English* law, as is mentioned more particularly in note to N° 208.

[221] It is also a consequence of the retrospective effect of conditions, that if a conditional engagement is contracted by an act which gives a right of hypothecation, the hypothecation will be held to have been acquired from the time of the contract, although the condition may not be accomplished until long afterwards.

[222] *[Here follows a paragraph respecting the right of opposing a sale of the lands hypothecated, which being merely technical, is not included in the translation. The distinction between contracts, which do or do not give a right of hypothecation, is not analogous to any thing in the English law; it is a subject entirely different from the maritime contract of express hypothecation.]*

§ VI. *Whether it is necessary, when an Obligation is contracted upon several Conditions, that they should all be accomplished.*

[223] This question is to be answered with a distinction. Where several conditions are connected by a disjunctive particle, as where I engage to do any thing in your favour, *if such a ship arrives safe, OR if I am appointed to such an employment*, it is sufficient to perfect the obligation if one of the conditions is accomplished. But where they are connected by a conjunctive particle, as when it is said, *if such a ship arrives, AND I am appointed to such an employment*, all the conditions must be accomplished, and if any one is not so, the obligation fails. *L. 129. ff. de verb. Obl. (a).*

Observe, however, that in testaments, and even in contracts, disjunctive particles are taken in a copulative sense, when it is evident that they were so intended by the testator, or the contracting parties, as where a person charges his son with a substitution, *(b) if he dies without children, OR without having disposed of the estate*, it is evident that in this substitution, whether it is contained in a testament or a grant, the disjunctive particle *OR*, is understood in a copulative sense, and that the substitution only takes place upon the accomplishment of both the conditions, *l. 6. Cod. inst. et subs. (c).*

ARTICLE

(a) *Si quis ita stipulatus fuerit, decem aureos das si NAVIS VENIT ET TITIVS CONSUL FACTUS EST ? non alias dabitur quam si utrumque factum sit. Idem in contrarium DARE SPONDES, si NEC NAVIS VENIT, NEC TITIVS CONSUL FACTUS SIT ? exigendum erit ut neutrum factum sit. Huic similis scriptura est, Si NEQUE NAVIS VENIT, NEQUE TITIVS CONSUL FACTUS EST : aut si sic, DABIS si NAVIS VENIT AUT TITIVS CONSUL FACTUS SIT ? sufficit unum factum. Et contra, DABIS si NAVIS NON VENIT AUT TITIVS CONSUL FACTUS NON EST ? sufficit unum non factum.*

(b) This is nearly the same as devising an estate to his son with a limitation over.

(c) Generaliter sancimus, si quis ita verba sua composuerit, ut edicat *si filius vel filia in-*
status

ARTICLE II.

Of Resolutive Conditions, and of Obligations determinable, on a certain condition, and of those which are limited to a certain Time.

[224] Resolutive conditions are those which are added, not to suspend the obligation until their accomplishment, but to make it cease when they are accomplished. An obligation contracted under a resolutive condition, then, is perfect from the instant of the contract, and the creditor may demand the payment of it. But if, before it is acquitted, or the debtor is put *en demeure* (a), the condition, upon which it was agreed that it should be defeated, is accomplished, the obligation will cease.

This difference, between resolutive conditions, and the suspensive conditions spoken of in the preceding article, may be illustrated by the following example. You lend *Peter* by my orders the sum of 1000*l.* and I engage to return it if such a ship, on which he holds a bottomry interest, arrives safe. This is a suspensive condition, and I am not your debtor until the condition is accomplished by the arrival of the vessel; but if I engage for *Peter* until the arrival of the vessel, that is to say, upon condition that my obligation shall only continue until the arrival of the vessel, the condition in this case is only a resolutive condition, which does not prevent my engagement from being perfect immediately upon its being contracted, and consequently you may immediately demand the payment of the money. All the effect of this condition is, that if the vessel arrives before I have discharged, or been called upon to discharge my obligation, the accomplishment of the condition puts an end to it.

testatus vel intestatus vel sine liberis (aut sine testamento) vel sine nuptiis decesserit, et ipse vel ipsa liberum sustulerit vel nuptias contraxerit, sive testamentum fecerit; firmiter res possideri et non esse locum substitutioni eorum vel restitutioni.

There are many cases in the *English* courts in which the word *or* is construed as *and* or *vice versa*, when from the context or subject-matter such construction appears more consistent with the intention. *Vid* *Richardson v. Spragg*, 1 P. Wms. 434. *Kilway v. Kilway*, 1 P. Wms. 348. *Hawes v. Hawes*, *Birch v. Dalway*, 1 Ves. 13. 19. *Jackson v. Jackson*, id. 217. *Read v. Snell*, 2 Atk. 645. *Walsh v. Peterson*, 3 Atk. 193. & *Sanders' Notes*, *Maberly v. Sirode*, 3 Ves. 450. *Waddell v. Mundy*, 6 Ves. 341. In *Long v. Dennis*, 1 Bar. 2052, a testator directed that if his son should marry any woman not having a competent portion, or without the consent of his trustees, the estate after his death, should go over. He married a woman with a competent fortune but without consent, which was held a sufficient compliance with the condition, and the limitation over did not take place. Lord Mansfield said that he could never mean that both parts should at all events be fulfilled; that if the trustees consented, a question might afterwards arise concerning the competence of the portion.

(a) *Vide ante*, No. 229.

[225] In the same manner, as an obligation may be limited until the occurrence of a certain condition, it may be also limited to a certain time. For instance, if I become surety to you for *Peter* for three years, I shall be discharged from my obligation as soon as that time is expired.

[226] Observe, however, that when the debtor before the expiration of the time, or before the accomplishment of the condition which is to dissolve the obligation, is put *en demeure* by a judicial interpellation, his obligation cannot afterwards be dissolved in this manner; *l. 59. § 5. ff. Mand. (a)*. The reason is evident; the creditor ought not to suffer from the unjust delay of his debtor, in discharging his obligation whilst it subsisted, neither can the debtor take advantage of his own delay.

See *infra* P. 3. Ch. 7. Art. 2. as to the extinction of obligations by a resolutory condition, or the expiration of a resolutory term.

A R T I C L E III.

Of a Term of Payment.

[227] An obligation is either contracted with a term for discharging it, or not: when it is contracted without a term, the creditor may require it to be discharged immediately; when it includes a term, he cannot require it until the term is expired.

§ I. *What a Term of Payment is, and the different Kinds of it.*

[228] A term is a space of time granted to the debtor for discharging his obligation: there are express terms, resulting from the positive stipulations of the agreement; as where I undertake to pay a certain sum on a certain day; and also terms which tacitly result from the nature of the things which are the object of the engagement, or from the place where the act is agreed to be done. For instance, if a builder engages to construct a house for me, I must allow a reasonable time for his fulfilling his engagement. If a person at *Orleans* undertakes to deliver something to my correspondent at *Rome*, the engagement tacitly includes the time necessary for taking the thing to *Rome*.

(a) *Ille illi salutem. Mando tibi ut Blasio Severo adfui meo octingenta credas, sub pignore illo [et illo] in quem pecuniam & quidquid usurarum nomine accesserit, indemnem rationem quam me esse ex causa mandati, in eam diem quoad vixerit. Blasius Severus præstaturum. Postea sæpe conventus mandator, non respondit: Quæro an morte debitoris liberatus sit? Paulus respondit mandati obligationem perpetuam esse, licet in mandato adjectum videatur, indemnem rationem tuam esse ex causa mandati, in eum diem, quoad vixerit Blasius Severus præstaturum.*

A term

[229] A term, is either of right or of grace : when it makes part of the agreement, and is expressly or tacitly included in it, it is of right ; when it is not part of the agreement, it is of grace ; as if it is afterwards granted by the prince or the judge at the requisition of the debtor (a).

§ II. *Of the Effect of a Term, and in what Respect it differs from a Condition.*

[230] A term differs from a condition, inasmuch as a condition suspends the engagement formed by the agreement : whereas a term does not suspend the engagement, but merely postpones the execution of it (b). A person who promises to pay upon a certain condition, is not a debtor until the condition has taken place ; there is merely an expectation of his becoming so ; therefore if he pays what is the object of the obligation, by mistake and before the condition is accomplished, it may be reclaimed, as we have seen in the preceding article ; on the contrary, a person who owes any thing subject to a term not yet expired, is a real debtor, and if he pays within the time he has no right of repetition, for he has only paid what was in effect due from him ; but though he is a real debtor, he is not compellable to discharge his obligation until the expiration of the term.

Sometimes the word *owes* (*devoir, debere*) is taken strictly for what may be actually demanded, and in this sense it is said that a person who has a term, does not owe any thing.

[231] A term defers the right of requiring payment until it is fully completed. Therefore if I promise to pay this year, no demand can be enforced on the last day ; for that day is comprized within the term.

[232] This effect of a term, in postponing the right of requiring payment until it is expired, is common to a term of right, and to a term of grace.

A term of right has another effect which is peculiar to itself,

(a) The *English* law does not admit of any such term for general purposes. The courts of equity often prescribe certain times within which acts are to be done, as for instance, the redeeming of mortgages ; but the exercise of this discretion, or more properly speaking, this mode of adjudication has a very slight analogy to the term of grace referred to in the text. By the special jurisdiction of courts of conscience, for the recovery of small debts, a payment is often awarded to be made by instalments, to which the effects of a term of grace, as stated by *Pothier*, may be fairly and naturally applied.

(b) This distinction is in *England* often very material with respect to cases affected by the bankrupt laws ; a debt due at a future time (or according to the phrase applied to that subject, *debitum in presenti solvendum in futuro*) being intitled to the benefit of the commission, which a conditional (more frequently termed a contingent debt) is not.

viz. that it prevents the debt being opposed by way of compensation or set-off, until it is expired.

For instance, on the first of *January* 1800, I lend you a thousand pounds, which you engage to pay on the first of *January* following. Afterwards you become the heir (a) of my creditor for a like sum due without any term. You demand the payment of this sum in *July* 1800. I cannot set off against it the money due from you to me payable on the first of *January* 1801, for as compensation or set-off is a payment, I cannot oblige you to pay me before the term, contrary to the agreement.

It is otherwise with respect to a term of grace. That stops the pursuits of the creditor, but it does not exclude the right of compensation. Therefore, if I lend you on the first of *January*, a thousand pounds payable on demand, and you obtain from the prince or judge a term until the first of *January* following; if on having become the heir of my creditor for a like sum, you demand the payment of it in *July*, the term of grace which is allowed to you, will not prevent my compensation of the money due to me. The term of grace has no effect, except to stop the rigor of prosecution; and does not suspend the right of compensation, *aliud est enim diem obligationis non venisse, aliud humanitatis gratia tempus indulgeri solutionis*, l. 16. § 1. ff. de Compens.

[233] It remains to observe concerning the effect of a term, that being presumed to be inserted in favour of the debtor, l. 17. (b.) ff. de Reg. Jur. the debtor may very well defend himself from payment before the expiration of the term, but the creditor cannot refuse receiving if the creditor is willing to pay, l. 70. de Solut. (c) l. 17. de Reg. Jur. at least unless it appears from the circumstances that the term was appointed in favour of the creditor, as well as of the debtor.

The time of payment specified in bills of exchange, is deemed to be appointed in favour of the creditor, who is the holder, as well as of the debtor: Declaration, 28th November, 1712 (d).

§ III. Of

(a) The right of setting off a debt due from a person in his own right against another due to him as heir, is at this place only a matter of incidental illustration. The mutuality requisite in cases of set-off, will be a subject of particular attention in its proper place.

(b) Cum tempus in testamento adjicitur, credendum est pro herede adjectum; nisi alia mens fuit testatoris, sicuti in stipulationibus promissoris gratia tempus adjicitur.

(c) Quod certo die promissum est, vel statim dari potest; totum enim medium tempus ad solvendum promissori liberum relinqui intelligitur.

(d) It is manifest, that if a husbandman engages to mow my meadow on the first of *June*, he does not discharge the obligation by mowing it on the first of *May*. Neither can a person derive any collateral advantage from an anticipated payment; as if he is bound to pay money with interest on the first of *June*, he cannot discharge himself from the intermediate interest by offering the principal on the first of *May* against the will of the credi-

tor,

§ III. Of a Case in which the Debt may be required within the Time.

[234] The term granted by the creditor to his debtor is supposed to be founded on a confidence in his solvency; when that foundation fails, the effect of the term ceases.

[235] Hence it follows, that when the debtor fails, and the price of his effects is distributed among his creditors, the creditor may take his share, although the term is not expired; this also is a difference between a term and a condition; for a conditional creditor has not in this case any right to take a share (a), but only to oblige the other creditors to refund his proportion of the condition, if the condition afterwards takes place. Observe, that if several persons are debtors jointly (*in solido*), and some of these fail, the creditor may demand the debt within the term from these, but not from those who are solvent. The solvent party has a right to the enjoyment of his term, and is not even obliged to give security. This was adjudged by an *arrêt* of the 29th Feb, 1592. The reason is, that the debtor who continues solvent, ought not, without his own act, to be further obliged than he originally intended; he cannot then be compelled to give a security which he had not entered into any obligation to give: the failure of the other joint debtors being their act, and not his, it cannot prejudice him, according to the rule, *nemo ex alterius facto pręgravari debet*.

§ IV. Of a Term joined to Conditions.

[237] Agreements sometimes include both a condition and a term; in this case it is necessary to examine whether the term is applied only to the condition or to the disposition also (b). In the first case, as soon as the condition is accomplished, it

tor, who by express stipulation was to have interest to a subsequent period. If there be a condition to re-enter on payment of 100*l.* on the first of *May*, though the grantor pays before, he cannot re-enter until the first of *May*.

(a) This difference, above referred to, is supported by the *English* bankrupt law, but it is there carried further; as it appears that, by the law of *France*, the occurrence of the condition, subsequent to the failure, intitles the creditor to a proportionate share, whereas no person is intitled to relief under the bankrupt laws, who is not an actual creditor at the time of the bankruptcy.

(b) In *Sidney v. Vaughan*, 2 Bro. P. C. 2 ed. 254. a person left a sum of money to her nephew, then being an apprentice to *A. B.* to be paid him within six months after he should have fully served out his apprenticeship. The nephew ran away before the end of his apprenticeship, and it was contended that the legacy was not payable at a certain time at all events, but only in case he fully served out his apprenticeship, which was in the

it is not necessary to wait for the expiration of the term, in order to demand the payment of the debt. For instance, if you agree to pay me a hundred pounds, provided I marry within three years, and I marry within six months, I may immediately demand payment of the hundred pounds, without waiting for the expiration of the three years. Likewise if you agree to give me a hundred pounds in case I do not go into *Italy* before the month of *May*, the sum may be demanded as soon as it becomes certain from my death that I cannot go into *Italy*, *l. 10. ff. de verb. Obl. (a)*, without its being requisite to wait until the month of *May*, because the term was prefixed to the condition, and not to the disposition. But on the contrary if it is said, if I marry before the first of *January* you shall then *(b)* (*pour lors*) give me one hundred pounds, the word *then* shews that the term is applied to the disposition as well as to the condition, and therefore though I accomplish the condition by marrying, I cannot demand the sum promised, until after the expiration of the term, *(c)* *l. 4. § 1. ff. de Cond. et Dem. (d)*.

ARTICLE IV.

Of the Place agreed upon for Payment.

[238] When the agreement specifies a certain place where the payment is to be made, the place is supposed to be appointed for the advantage of the creditor as well as of the debtor, therefore the debtor cannot oblige the creditor to receive it elsewhere. *Is qui certo loco dare promittit, nullo alio loco quam in quo promisit solvere invito stipulatore potest, l. 9. ff. de eo quod certo loco, &c.*

But according to the principle of the *Roman law*, the creditor may demand payment from the debtor at another place, making compensation to the debtor for any damage which he might suf-

nature of a condition. It was answered, that the serving out the apprenticeship was not to be considered as a condition for the non-performance whereof the legacy would be forfeited, but was only an appointment of the time when the legacy should be paid ; and so it was decided.

(a) Hoc jure utimur, ut ex hac stipulatione, Si *Lucius Titius* ante *calendas Martii* in *Italiam* non venerit, decem dare spondes ? non ante peti quicquam possit, quam exploratum sit ante eum diem in *Italiam* venire *Titium* non posse, neque venisse, five vivo, five mortuo id acciderit.

(b) *Then* in the *English* language is referable to *in that case*, as well as *at that time*, an ambiguity upon which some questions of construction are reported in our books.

(c) Si ita scriptum sit, si in quinquennio proximo *Titio* filius natus non erit, & tunc decem *Seix* heres erit. si *Titius* ante mortuus sit, non statim. Seix decem debet, quia hic articulus sum extremi qui quernii tempus significat.

(d) See Appendix, No. IX.

fer in consequence of the alteration ; this was the subject of the action *de eo quod certo loco*, &c.

[239] This action is not in use in *France*, and the creditor can no more oblige the debtor to pay, than the debtor can oblige the creditor to receive elsewhere, than at the place agreed upon (a).

Hence it follows, that when the creditor is not resident at the place where the payment ought to be made, he ought to appoint a domicil there for the purpose, otherwise he cannot put the debtor *en demeure*. This domicil ought to be notified to the debtor either by the agreement or by a judicial signification. In default of the creditor having such a domicil, the debtor may assign him to appoint one ; and if he does not, the debtor will be allowed to appoint one himself.

[240] [The next paragraph refers to the mode of execution in the French courts.]

[241] It remains to observe, that if the agreement contains two different places for payment, and they are connected by a conjunctive particle, the payment ought to be made by a moiety in each place, *l. 2. § 4. ff. de eo quod certo loco* (b). If by a disjunctive, the payment ought to be made altogether in either of the places at the choice of the debtor, *generaliter definit Sævola petitem habere electionem ubi petat, reum ubi solvat, scilicet ante petitionem, l. 2. § 3. ff. d. Vide as to the place of payment, P. 3. C. 1. Art. 5.*

A R T I C L E V.

Of Obligations contracted, with a Power of paying to some Person who is indicated, or with the Power of paying some other thing in lieu of that which is due by the Obligation.

[242] Regularly, a payment cannot be made to any other person than the creditor, without his consent. Therefore it is a quality which is collateral and accidental to an obligation, when it is contracted with a liberty of paying to some other person specially indicated. See P. 3. Ch. 1. Art. 2. § 4.

[243] Neither can any other thing be regularly paid to the creditor without his consent, in lieu of that which is due to him, and which is the object of the obligation. Nevertheless, an obligation is sometimes contracted with liberty of paying something

(a) This is likewise the law of *England*.

(b) Si quis in stipulatur Ephesi & Capuz, hoc ait ut Ephesi partem et Capuz partem petat.

else, instead of what is regularly due ; as, if I let a farm for a hundred a year, with liberty to the tenant to pay the amount in corn according to the current price of the country, though it is the money which is due to me from the tenant, he may notwithstanding give me corn in lieu of it.

So if any body leaves me a house by will, with liberty to the heir to pay me five hundred pounds in lieu of it ; the heir by accepting the succession contracts an obligation in my favour, *ex quasi contractu*, to deliver me the house, but subject to the option of paying me the money.

[244] These obligations must not be confounded with the alternative obligations which will be next mentioned. In the latter all the things promised in the alternative are due ; but where an obligation is contracted with power of substituting one thing in payment for another, the latter only is due ; what the debtor has the special liberty of paying is not due, it is not *in obligatione*, but only *in facultate solutionis*, as in the instance of the legacy of the house.

Hence it follows, 1st. That the creditor can only demand the house and not the money, although the debtor may at his option pay the money. 2d. That if the house is swallowed up by an earthquake, the debtor is entirely liberated. 3d. That the right resulting from the legacy falls within the class of immoveable property, even where the debtor uses his election to pay the money ; for the nature of the credit is regulated by the thing due, and not by any thing that may be substituted in lieu of it (a).

ARTICLE VI.

Of Alternative Obligations (b).

[245] An alternative obligation is contracted where a person engages to do, or to give several things in such a manner, that the payment of one will acquit him from all : as if I engage to give you a particular horse, or twenty guineas to build you a house, or pay you a hundred pounds.

Where a person is obliged in the disjunctive to pay one sum of money or another, he is only debtor to the amount of the least, *scilicet*

(a) This is illustrated by a case unintelligible, without a technical knowledge of the law of *France* ; the principle of it would be applied to the *English* law, by holding that if the devisee died before the election made by the heir, of paying the money ; the money afterwards elected to be paid should belong to the heir, and not to the executor of the devisee.

(b) See Appendix, No. X.

ita stipulatus fuero decem aut quinque dari spondes, quinque debentur, l. 12. ff. de verb. Oblig.

[246] In order to constitute an alternative obligation, it is necessary that two or more things should be promised disjunctively. Where they are promised conjunctively, there are as many obligations as the things which are enumerated, *l. 29. ff. de verb. Obl. (a)*, and the debtor cannot be wholly liberated without discharging them all; but where they are promised in the alternative, though they are all due, there is but one obligation which may be discharged by the payment of any of them, *alterius solutio totam obligationem interimit, l. 27. ff. de Legat.*

[247] The choice belongs to the debtor (*b*) *l. 25. ff. de Contr. Empt.* unless it is expressly agreed that it shall belong to the creditor. This is a consequence of the rule of interpretation stated *supra, n. 97*. But though the debtor may elect to pay which he pleases, he cannot pay part of the one and part of the other. Therefore if the obligation is to pay ten pounds or six measures of corn, or a hundred pounds or an acre of land; he cannot give fifty pounds and half the land, or five pounds and six measures of corn; he must either pay all the money or give the whole land, or the whole quantity of corn; so where the creditor has the choice he cannot require part of the one and part of the other, *l. 8. § 2. ff. de Leg (c)*. In case of rents, and annual sums, which are due in the alternative, as a rent of 40s. or a quarter of corn a year, the debtor may choose every year which he will pay, and though he has paid the money the first year, he may elect to pay the corn the rest, *et vice versa, l. 21. § 6. ff. (d) de Act Empt.*

From

(a) Scire debemus in stipulationibus tot esse stipulationes, quot summæ sunt, totque esse stipulationes, quot species [sunt]. Secundum quod evenit, ut mixtâ unâ summâ vel specie, quæ non fuit in præcedenti stipulatione, non fiat novatio: Sed efficit duas esse stipulationes, quamvis autem placuerit tot esse stipulationes, quot summæ, totque esse stipulationes, quot rea: tamen si pecuniam quis quæ in conspectu est, stipulatus sit, vel acervum pecuniæ, non tot sint stipulationes, quot nummorum corpora, sed una stipulatio: nam per singulas denarios singulos esse stipulationes absurdum est. At si quis illud et illud stipulatus sit, tot stipulationes sunt, quot corpora. Stipulationem quoque legatorum constat unam esse, quamvis plura corpora sint, vel plura legata; sed et familiæ vel omnium servorum stipulatio una est. Itemque quadrigæ aut lecticæ rivoꝝ stipulatio una est.

(b) Si ita distrahitur ILLA AUT ILLA utram eliget venditor, hæc erit emptæ.

(c) Si ita legatum sit *Leſſiciarios octo, aut pro his in homines singulos certam pecuniam ærum legatarius volet*: non potest legatarius partem servorum vindicare, pro parte nummos petere; quia unum in alterutra causa legatum sit; quemadmodum si olei pondo quinquaginta aut in singulas libras certum æs legatum sit; ne aliter observantibus, etiam uno homine legato divisio concedatur; nec interest, divisæ ea summa an junctæ ponatur; [et] certe octo servis aut pro omnibus certa pecunia legata non posse invitum heredem partem pecuniæ, partem mancipioꝝ debere.

(d) Qui domum vendebat, *exceptit sibi habitationem, donec viveret, aut in singulos annos decem;*

[248] From the principle, that the things comprised in an alternative obligation are all due, without any of them however being due determinately, it follows. 1st. That the demand of the creditor, to be regular, must include all of them, not indeed conjointly, but according to the alternative under which they are due. If he only demanded one of them, his demand would be irregular; because neither is due determinately, but both alternately. Nevertheless, if by express agreement the option is given to the creditor, he may demand either separately.

[249] 2d. That an obligation is not alternative where one of the things is not susceptible of the obligation intended to be contracted, but in this case the obligation is a determinate obligation of the other. Therefore it was decided in *l. 72. § 4. ff. de Solut. (a)*, that if a person promised me in the alternative two things, whereof one belonged to me already, that he had not a liberty of paying that in lieu of the other, although it might afterwards cease to belong to me; because, this not being at the time of the contract susceptible of the obligation contracted in my favour, the other only was due, *cum res sua nemini deberi possit*.

[250] 3d. It follows, that when several things are due in the alternative, the extinction of one does not extinguish the obligation: for, all being due, the obligation subsists with regard to such as remain, and they only cease to be due by the payment of one. For the same reason, if the creditor by a beneficial title becomes owner of one of the things by another beneficial title, the obligation, which cannot subsist with respect to the thing whereof he is thus become the proprietor, nevertheless subsists as to the other, *l. 16. (b) de verb. Oblig.*

When one of two things, due under an alternative obligation, happens to perish, will the debtor be allowed to offer the price of that in order to avoid the payment of the other? no; for what is

decem; emptor primo anno maluit decem præstare; secundo anno habitationem [præstare]. Trebatius ait, mutandæ voluptatis potestatem eum habere, singulisque annis alterutrum præstare posse; et quamdiu paratus sit alterutrum præstare, petitionem non esse.

(a) Stichum aut Pamphilum stipulatus sum, cum esset meus Pamphilus; nec si meus esse desierit, liberabitur promissor Pamphilum dando; neutrum enim videtur in Pamphilo homine constituisse, nec obligatio, nec solutio, sed ei, qui hominem dari stipulatus est, unum etiam ex his, qui tunc stipulatori servierant, dando promissor liberatur, vi quidem ipsa et hic ex his dari stipulatus est, qui ejus non erat, fingamus ita stipulatum, *hominem ex his quos Sempronius reliquit dare spondes?* cum tres Sempronius reliquisset, eorumque aliquem stipulatoris fuisse, num mortuis duobus, qui alterius erant, supererit ulla obligatio, videamus? et magis est deficere stipulationem; nisi ante mortem duorum desierit esse reliquos servus stipulatoris.

(b) Si Stichum aut Pamphilum mihi debeas, et alter ex eis meus factus sit ex aliqua causa, reliquum debetur mihi a te.

lost, thereby ceases to be due ; and what remains is the only thing which continues due, and consequently the only thing which can be paid, *l. 2. § 3. (a) ff. de eo quod certo loco. l. 34. § 6. ff. de Contr. Empt. (b). l. 95. § 1. ff. de Solut. (c) The law 47. § 3. ff. de Leg. 1. (d)* seems contrary to this decision : it is said, that two slaves having been left under an alternative obligation, and one of the two being dead, the heir was bound to give the one which remained ; and it is added, or perhaps the price of that which was dead, *fortasse vel mortui pretium*, but this decision, as *Dumoulin* very well observes, ought to be restrained to the case where it appears from the circumstances that such was the intention of the testator, as is indicated by the term *fortasse, fortassis*.

[251] It is immaterial whether one of the things due in the alternative is lost, without any act or default, or delay on the part of the debtor, or by any default, or after delay.

In all these cases, what remains is the only thing which continues due, and the debtor is not required to offer the value of that which no longer subsists, *d. l. 95. ff. de Solut.* neither is this repugnant to the maxim, that where a thing is lost by the fault of the person from whom it is due, it is still to be considered as due in respect of the value which becomes due in its stead, *l. 82. § 1. ff. de verb. Obl. (c)* For this maxim, being established in favour of the creditor, cannot be objected against him in the case of an alternative obligation, as neither the delay nor the fault of the debtor ought to

(a) *Scævola lib. 15. Quæstionum ait, non utique ea quæ tacite insunt stipulationibus, semper rei esse potestate : sed quid debeat esse in ejus arbitrio, an debeat non esse ; et ideo cum quis Stichum aut Pamphilum promittit eligere posse quod solvat, quamdiu ambo vivunt ; cæterum ubi alter decessit, extinguí ejus electionem, ne sit in arbitrio ejus an debeat, dum non vult vivum præstare, quem solum debet.*

(b) *Si emptio ita facta fuerit, est mihi emptus Stichus aut Pamphilus ; in potestate est venditoris, quem velit dare, sicut in stipulationibus : sed uno mortuo, qui superest dandus est, et ideo prioris periculum ad venditorem, posterioris ad emptorem, respicit ; sed et si pariter decesserunt, pretium debetur : unus enim utique periculo emptoris fuit arbitrium, quem commissum sit, ut quem voluisset, emptum haberet non et illud et emptorem haberet.*

(c) *Quod si promissoris fuerit electio, defuncto altero, qui superest neque peti poterit : Enimvero si facta debitoris, alter sit mortuus, cum debitoris esset electio ; quamvis interim non alius peti possit, quam qui solvi etiam potest ; neque defuncti offerri æstimatio potest, si forte longe fuit vilior, quoniam id pro petitore in pœnam promissoris constitutum est : tamen si et alter servus postea sine culpa debitoris moriatur, nullo modo ex stipulatu agi poterit cum illo in tempore quo moriebatur, non commiserit stipulationem.*

(d) *Sed si Stichus aut Pamphilus legatur, et alter ex his vel in fuga sit, vel apud hospes, dicendum erit præsentem præstari, aut absentis æstimationem, toties enim electio est heredi committenda quoties moram non est facturus legatario. Quæ ratione placuit & si alter decesserit, alterum omnimodo præstandum, fortassis vel mortui pretium. Sed si ambo sint in fuga, non ita cavendum, ut si in potestate ambo redirent, sed si vel alter, & vel ipsam, vel absentis æstimationem præstandum.*

(e) *Si post moram promissoris homo decesserit, tenetur nihilominus proinde ac si homo viveret : & hic moram videtur fecisse, qui litigare maluit, quam restituere.*

prejudice the creditor: whereas they would prejudice him and alter his situation, if the debtor, having it in his power to accomplish his obligation by the things which remain, could offer the value in money of that which was lost, and which the creditor would not be bound to receive, if both had continued to subsist.

[252] Where two things are lost successively by the fault of the debtor, or after his delay, the debtor, though he had the choice which he would give, has not the same choice with respect to the payment of the value; for by the extinction of the first he became determinately debtor of the other, and therefore he is liable determinately for the value of that which last becomes extinct.

Where the first is lost through his default, and the other is also lost, but without his fault, and without any imputation of delay, although according to legal subtleties, he may appear to be acquitted of both; it is just that he should be answerable for the value of that which has perished by his fault.

[253] If the choice is given to the creditor, he has his option to take the thing which remains, or the price of that which is lost by the fault of the debtor, otherwise he would suffer a detriment from such faults, if the thing lost were the more valuable.

[254] It also follows from the principle before stated, that so long as the things which are due in the alternative continue to subsist, the obligation continues indeterminate and uncertain, and can only be referred to one of them determinately, by payment being actually made; and of this it is the natural consequence, that where an immoveable and a moveable thing are due in the alternative, the nature of the credit is in suspense. If the debtor gives the immoveable, the credit will be deemed of the nature of a real estate, and if he gives the moveable thing it will be deemed to be personal; and herein an alternative obligation differs from the determinate obligation of a certain thing, with the liberty of giving another in its place.

[255] A testator having given a certain piece of painting absolutely by his will, and by a codicil given the same painting, or a sum of money in the alternative; before the codicil was found, the painting was delivered by the heir, who supposed himself to owe it determinately. Afterwards the codicil having been found, and the heir having discovered that he only owed the painting in the alternative of paying the money, assigns the legatee for the repetition of the painting, offering to pay the money: the two schools of the *Roman* law were divided upon the question, whether he was well founded in his demand. *Celsus*, who was
of

of the school of the *Proculians*, decides in law 19. *ff. de Leg. 2.* (a) for the negative.

The reason of this decision is, that the things comprized in an alternative obligation, being all due, the payment of the painting is the payment of a thing actually due, and consequently a valid payment, and not subject to repetition.

On the contrary, *Julian*, who was of the school of the *Sabinians*, decides in the law 32. § 3. *ff. de Cond. Indeb.* (b). that there is a right of repetition where a debtor paid a thing which he believed to be due determinately, being only debtor indeterminately of a thing of a certain kind, or even of the thing actually paid, but alternatively with another. The reason of this decision was, that the innocent error of the debtor respecting the quality of his obligation, ought not to operate to his prejudice, nor increase his obligation by depriving him of his choice of giving the money rather than the painting. And with respect to the reason alledged for the contrary opinion, the answer is, that there is a right of repetition, not only where any thing is paid without being in any manner due, but also when more is paid than is due, which holds good now, *solum quantitate debiti et causa*; and therefore in the case supposed, a person who had given that as being determinately due, which in fact was only due with the alternative of another thing, has paid more than was due. And this payment ought to be subject to repetition upon offering what is due instead thereof. This latter opinion is more equitable than the former, as it gives each party what rightfully belongs to him.

[256] *Dumoulin* applies a qualification to this decision: where the debtor has led the creditor into the mistake, and the property has been fairly received, the repetition cannot take place, except it can be done without prejudice to the creditor, and he can be placed in his original situation; for the right of repetition is wholly founded upon a reason of equity, *hæc conditio ex bono et æquo introducta*, l. 66. *ff. de Conditione Indeb.* It is only founded upon this rule of equity, which does not allow that one man shall enrich himself at the expence of another; therefore it can only prevail to the extent of the advantage actually acquired (c) l. 65. § 7, & 8. *ff. de*

(a) Si is cui legatus, sit Stichus, aut Pamphilus, cum Stichum sibi legatum putaret, vindicaverit; amplius mutandæ vindicationis jura non habet: tanquam si damnatus heres alterutrum dare, Stichum dederit, cum ignoret sibi permissum vel Pamphilum dare, nihil repetere possit.

(b) Qui hominem generaliter promissit, similis est ei qui hominem aut decem debet; & ideo, si, cum existimavit se Stichum promississe, eum dederit, condicet: alium autem quolibet dando, liberari poterit.

(c) Sic habitatione data, pecuniam condicam: non quidam quanti locari potui, sed quanti

ff. dict. tit. According to these principles, it must be decided on the case supposed, that if the legatee has fairly sold the thing delivered to him, he will only be answerable for the excess of price above the sum which there was an option to pay.

According to the same principles, if the money is paid which is supposed to be determinately due, although it is only due in the alternative, the debtor would not be easily admitted to sue for a repetition thereof, upon offering the alternative, if the creditor had spent the money, and there was not a great disproportion in the amount thereof and the value of the other thing (a).

[257] Another question upon which the two ancient schools were divided, was where a person who owed two things in the alternative, being misled by an erroneous copy which contained the word *and* instead of *or*, paid them both at one time; and afterwards discovered that only one of them was due, and that at his election.

There was no doubt of his right to reclaim one; but the point in dispute was, whether he had an option which to claim. *Celsus*, as cited by *Ulpian* in law 26. § 13. (b) in *fin. ff. de Cond. Ind.* thought that the choice rested with the creditor, and that he had a right to retain what he pleased. *Julianus*, on the contrary, as cited by *Justinian* in *l. penult. cod. hujus tituli*, (c) thought that the debtor had

tu conducturus fuisses, § 8. Si servum indebitum tibi dedi, eumque manumisti, si sciens hoc fecisti, teneberis ad pretium ejus: Si nesciens, non teneberis: sed propter operas ejus liberti, & ut hereditatem ejus restituas.

(a) I cannot think that the circumstance of having spent the money would in the *English* courts be allowed to affect the nature or extent of the obligation.

(b) Si decem aut Stichum stipulatus, solvam quinque, queritur an possim condicere? Quæstio ex hoc descendit, an liberor in quinque: nam si liberor, cessat conditio, si non, liberor erit conditio? Placuit autem (ut *Celsus* lib. 6. & *Marcellus*, lib. 20. *Digestorum* scripserunt) non perimi partem dimidiam obligationis, ideoque cum qui quinque solvit, in pendenti habendum an liberaretur, petique ab eo posse reliqua quinque, aut Stichum; & si præstiterit residua quinque, videri eum & in priora debita solvisse. Si autem Stichum præstiterit, quinque eum posse condicere, quasi indebita; sic posterior solutio comprobabit priora quinque utrum debita & indebita solverentur; sed & si post soluta quinque & Stichus solvatur, & malim ego habere quinque & Stichum reddere, an sim audiendus querit *Celsus*? Et putat, natam esse quinque conditionem: *quævis* utroque simul soluto, mihi *ratum* quod vellem, arbitrium daretur.

(c) Si quis servum certi nominis, aut quandam solidorum quantitatem, vel aliam rem promiserit, & cum licentia [ei] fuerat unum ex his solvendo liberari, utrumque per ignorantiam dependerit: dubitabatur, cujus rei daretur a legibus ei repetitio, utrumne servi an pecuniæ: & utrum stipulator, an promissor habeat hujus rei facultatem? Et *Ulpianus*, quidem electionem ei præstat, qui utrumque accepit, ut hoc reddat, quod sibi præstiterit; & tam *Marcellum*, quam *Celsum* sibi consonantes refert. *Papinianus* autem ipse, qui utrumque persolvit, electionem donat: qui & antequam dependat, ipsam habet electionem, quod velit præstare; & hujus sententiæ sublimissimum testem adducit *Salvium Julianum*, summæ auctoritatis hominem, & prætorii edicti [perpetui] ordinatorem. Nobis hæc decidentibus, *Juliani* & *Papiniani* sententia placet, ut ipse [habeat] electionem recipiendi, qui & dandi habuit.

the right of demanding which he pleased. The opinion of *Celsus* was apparently founded upon the reasoning, that both the things due in the alternative being actually due, the debtor who had paid them both could not say of either determinately that it was not due; and therefore he could not demand either determinately as paid without being due; he had only the right of repetition as to one of the two indeterminately, as having paid more than was due by paying both when he was only under an obligation for the payment of one. The creditor having in his turn become debtor in respect to the restitution of one of the things, he had a right in consequence of that character to make his election which should be restored.

But this reasoning is nothing more than mere subtlety. The opinion of *Julian* is founded upon equity. The action, called *Condictio Indebiti*, is an entire restitution which equity affords against an erroneous payment. Now it is the nature of all restitutions against any act, to place the parties in the same situation as they were before. Hence it follows, that the debtor who had paid two things, being ignorant that he was only bound to pay one of them, and that at his own election, should be restored to the right which he had before, of only paying, and consequently to the right of reclaiming, which he pleases; this opinion, as being the most equitable, was embraced by *Pappinian*, and finally confirmed by the constitution of *Justinian*.

But the right of requiring such repetition can only apply in case both the things continue to subsist; if one of them had ceased to subsist after the payment, there could be no right of restitution, as *Julianus* decided in the (a) l. 32. ff. *dict. Tit.* The reason is evident; the right of repetition remits the parties to the same situation as if the payment had not been made, and were yet to make; now if the payment were yet to make, the debtor could not be excused from paying that which remained, and which alone was then due; that then ought to remain with the creditor as a valid payment, and without any right of repetition.

As to the indivisibility in payment of alternative obligations, see *infra* P. 3. Chap. 1. Art. 6. § 3.

(a) Cum is, qui Pamphilum aut Stichum debet, simul utrumque solverit, si posteaquam utrumque solverit, aut uterque, aut alter ex his defuit in rerum natura esse, nihil repetet, cum remanebit in soluto, quod superest.

ARTICLE VII. (a)

Of Obligations in Solido between several Creditors.

[258] Regularly, when a person contracts the obligation of one and the same thing in favour of several others, each of these is only creditor for his own share, but he may contract with each of them for the whole when such is the intention of the parties, so that each of the persons in whose favour the obligation is contracted is creditor for the whole, but that a payment made to any one liberates the debtor against them all. This is called Solidity of Obligation. The creditors are called *correi credendi, correi stipulandi*.

[259] An instance of this obligation in solido may be stated in the case of a testamentary disposition, made in these terms. My heir shall give to the *Carmelites* or the *Jacobins* a sum of one hundred livres; the heir in this case only owes a single sum, but he owes this entire sum to each of the two convents who are creditors of it in solido; but so that the payment of it to one will liberate him as against both, *l. 16. ff. de Legat. (b)*. 2d. This solidity is very rare with us; it must not be confounded with indivisibility of obligation, which will be treated of *infra*.

[260] The effects of this solidity amongst creditors are, 1st. That each of the creditors being creditors for the whole, may consequently demand the whole, and, if the obligation is executory, constrain the debtor for the whole (c). The acknowledgment of the debt made to any one of the creditors, interrupts the prescription as to the whole of the debt, and consequently enures to the benefit of the other creditors, *l. fin. cod. de duobus reis. (d)*. 3d. The payment made to any one of the creditors extinguishes the debt, for the creditor being such for the whole, the payment of the whole is effectually made to him, and this payment liberates the debtor as against all; for although there are several creditors, there is

(a) See Appendix, No. XI.

(b) Si Titio aut Seio utri *heres velit* legatum relictum est heres alteri dando ab utroque liberatur; si neutri dat, uterque perinde petere potest atque si ipsi soli legatum foret, nam, ut stipulando duo rei constitui possunt, ita et testamento potest id fieri.

(c) The meaning of the term executory, is here very different from that which is applied to it in the *English* law, as denoting a thing to be executed in future. It is foreign to the present purpose to enter into an inquiry respecting the kinds of obligations, for which the law of *France* allowed a remedy by seizure of the goods, and which is here denoted by the term before mentioned.

(d) Cum quidam rei stipulandi certos habebant reos promittendi, vel unus forte creditor datus, vel plures debitores habebat; vel è contrario multi creditores unum debitorem, & alii

is but one debt, which ought to be extinguished by the entire payment made to one of the creditors.

It is at the choice of the debtor to pay which of the creditors he will, as long as the matter is entire ; but, if one of them has instituted a process against him, he cannot make an effectual payment, except to that one; *Ex duobus reis stipulandi, si semel unus egerit, alteri promissor offerendo pecuniam nihil agit. l. 16. ff. de duob. reis. 4.* Each of the creditors being such for the whole may, before a process instituted by any of the others, make a release to the debtor, and liberate him, as against them all.

For in the same manner as a payment of the whole, to any one of the creditors, liberates the debtor against all, a release by one, which is equivalent to a payment, ought to have the same effect. *Acceptilatione unius tollitur obligatio, l. 2. ff. de duob. reis.*

A R T I C L E VII.

Of Solidity on the Part of the Debtors (a).

S E C T I O N I.

Of the Nature of an Obligation in Solido, on the Part of the Debtors.

[261] An obligation is contracted in solido on the part of the debtors, when each of them is obliged for the whole, but so that a payment made by one liberates them all.

Those who oblige themselves in this manner, are called *correi debendi*.

As solidity on the part of the creditors consists in this,

ex reis promittendi ad æris creditores debitorem & alii ex reis promittendi ad certos creditores debitum agnoverunt, vel per solutionem, vel per alios modos quos in anterioribus sectionibus, interruptionis invenimus positores : & nos ampliavimus, vel forte ad unum creditorem quodam ex debitoribus devotionem suam ostenderunt, vel cum plures essent creditores, debitor qui solus existeret, ad unum ex his vel quosdam debitum agnovit : & queratur, si lis vel si daretur licentia adversus alios indevotionem suam exerceri, & quasi tempore emisso exactionem recusare, vel quibusdam ex debitoribus debitum agnoscentibus, vel in judicio pulsatis, deberent & alii ab omni contradictione repelli ; nobis pietate suggerente videtur esse humanum, semel in uno eodemque contractu qualicumque interruptione, vel agnitione adhibita omnes simul compelli ad persolvendum debitum, sive plures sint rei, sive unus ; sive plures sint creditores, sive non amplius quam unus ; sancimusque in omnibus casibus quos noster sermo complexus est, aliorum devotionem vel agnitionem, vel ex libello admonitionem aliis debitoribus præjudicare & aliis prodesse creditoribus. Sit itaque generalis devotio & nemini liceat alienam indevotionem sequi cum ex una stirpe utroque fonte unus effluxit contractus, vel debiti causa ex eadem actione apparuit.

(a) See Appendix, No. XI.

that the obligation of the same thing contracted in favour of several persons, is contracted in favour of each for the whole, as completely as if each of them was the sole creditor; but with the qualification that a payment made to one is a liberation against all the others; solidity on the part of the debtors in like manner consists in the obligation of the same thing being contracted by each for the whole, as completely as if each was the single debtor; but so that a payment made by one liberates the others.

[262] It is not always sufficient to constitute an obligation in solido, that each of the debtors is debtor of the whole thing; for this is the case, with respect to indivisible obligations, which are not susceptible of parts, though they are not contracted in solido: it is requisite that each of the debtors *totum & totaliter debeat*, that is to say, it is requisite that each should be as completely bound for the performance of the whole, as if he alone had contracted the obligation.

[263] It is most particularly requisite, that all the debtors should be obliged to the performance of the same thing. It is therefore not one obligation in solido, but two obligations, when two persons oblige themselves to another for different things.

But, provided they are each obliged totally for the same thing, though they are obliged differently, they are still debtors in solido, *correi debendi*; as if one is obliged purely and simply, and the other subject to a condition or a term of payment; or if they are obliged to pay in different places. *l. 7. (a) l. 9. § 2. (b) ff. de duob. reis.*

It may perhaps be said to be repugnant, that one and the same obligation should have opposite qualities; that it should be pure and simple with respect to one of the debtors, and conditional with respect to the other. The answer is, that the obligation in solido, is one indeed with respect to the thing which is the object and subject matter of it, but it is composed of as many different liens as there are different persons who have contracted it; and those persons being different from each other, the liens which oblige them are so many different liens which consequently may have different qualities. This is the meaning of *Papinian*, when he says, *et si maxime parem causam suscipiunt, nihilominus in cujusque personâ propriâ singulorum consistit obligatio. d. l. 9. § 2.* The obligation is one with respect to its object, which is the thing due; but with re-

(a) Ex duobus reis promittendi, alius in diem, vel sub conditione obligari potest, nec enim impedimento erit dies, aut conditio, quo minus ab eo, qui pure obligatus est, petatur.

(b) Cum duos reos promittendi facerem (et) ex diversis locis Capuæ pecuniam dari stipulatus sim: ex persona cujusunque ratio proprii temporis habebitur: nam etsi maxime parem causam suscipiant; nihilominus in cujusque personâ propriâ singulorum consistit obligatio.

spect to the persons who have contracted it, it may be said that there are as many obligations as there are persons obliged.

[254] When several persons contract a debt in solido, it is only in respect of the creditor that they are debtors of the whole ; as between themselves the debt is divided, and each of them is only debtor *pro se*, as to that part of the debt of which he was the cause. Suppose, for instance, that two persons borrow together a sum of money which they engage in solido to repay ; or suppose they buy a thing, and engage in solido to pay for it to the seller : if they have equally divided the money borrowed, or the thing bought between themselves, each of them, although debtor for the whole in respect to the creditor, is only debtor for a moiety in respect of the other. If the division was unequal ; as suppose, one had had two-thirds of the money borrowed, or of the thing bought, and the other had only had one-third, he who had the two-thirds would, as between themselves, be debtor for two-thirds, and the other for only one-third of the amount. If one of them alone derived a benefit from the contract, and the other was only engaged on his behalf, (*pour lui faire plaisir*,) the person having the benefit is the only debtor ; the other, although a principal debtor so far as concerns the creditor, is in respect of his co-debtor only a surety.

So, if the debt arises from an injury committed by four persons, each is debtor for the whole in respect of the person suffering the injury ; but as between themselves, each is only debtor for his share in the injury, that is to say, for a fourth of the whole.

§ II. *In what Case the Obligation of several Debtors is held to be contracted in Solido.*

[265] Solidity may be stipulated in all contracts of whatever kind. *l. 9. ff. de duob. reis. a*). But regularly, it ought to be expressed ; if it is not, when several persons have contracted an obligation in favour of another, each is presumed to have contracted as to his own part. *l. 11. § 2. ff. de duobus reis (b)*. And this is confirmed

(a) Cum ita cautum inveniretur TOT AUREOS RECTE DARI STIPULATUS EST JULIUS CARPUS : SPOPONDIMUS, EGO ANTONINUS ACHILLEUS ET CORNELIUS DIUS, partes viriles deberi : quia non fuerat adjectum singulos in solidum spopondisse ita ut duorei promittendi fierent.

(b) Eandem rem apud duos pariter deposui, utriusque fidem in solidum secutus ; vel eandem rem duobus similiter commodavi ; sicut duo rei promittendi quia non tantum verbis stipulationis, sed & cæteris contractibus, veluti emptione, venditione, locatione conductione, deposito, commodato, testamento ; ut pote, si pluribus heredibus institutis testator dixit, *Tuius & Mævius Sempronio decem dato* § 1. Sed si quis in deponendo penes duos,

confirmed by *Justinian* in the *Novel* 99. (a). The reason is that the interpretation of obligations is made in cases of doubt in favour of debtors, as has been shewn elsewhere (b). According to this principle, where an estate belonged to four proprietors, and three of them sold it in solido, and promised to procure a ratification by the fourth proprietor, it was adjudged that the fourth, by ratifying the sale, was not to be considered as having sold in solido with the others: for, although the three had promised that he should accede to the contract of sale, it was not expressed that he should accede in solido.

[266] Nevertheless, there are certain cases in which solidity between several debtors of the same thing takes place, although it is not expressly stipulated.

The first case is when partners in commerce contract some obligation, in respect of their joint concern.

This is the decision of the law of *France*, *Ordonnance du Commerce* of 1673. t. 4. art. 7.

Two merchants who buy together a lot of merchandize, although there is not any other partnership between them, are considered as being in partnership with respect to that purchase; and as such are obliged in solido, although it is not expressed. This was adjudged in the parliament of *Toulouse*, and has become a general maxim.

[267] The second case in which several debtors of the same thing are bound in solido, without its being expressed, is, that of the obligation contracted by several tutors undertaking the same tutelage, or by several persons engaging in some public administration. These charges are undertaken in solido, according to the disposition of the laws which are followed by us in this respect, unless there is some usage to the contrary.

The *Roman* laws granted to tutors who have not acted, the benefit of order and discussion, which consisted in a right to refer the minor, whose tutelage was expired, to proceed at their risque against those who had acted; they also granted to tutors who

paciscatur ut ab altero culpa quaque præstaretur, verius est non esse duos reos, a quibus impar suscepta est obligatio. Non idem probandum est, cum duo quoque culpam promississent, si alteri postea pacto culpa remissa sit: quia posterior conventio, quæ in alterius persona intercessit, statum & naturam obligationis, quæ duos initio reos fecit, mutare non potest; quare si socii sint & communis culpa intercessit, etiam alteri pactum cum altero factum proderit § 2. Cum duos reos promittendi facerem, [&] ex diversis locis Caput pecuniam dari stipulatus sim: ex persona cujusque ratio proprii temporis habebitur; nam et si maxime parem causam suscipiunt; nihilominus in cujusque persona propria singulorum consistit obligatio.

(a) Si quis alterna fidejussione sumat aliquos, si quidem non adjecerit, deberet et unum horum in solidum teneri; omnes ex æquo conventionem sustinere. Si vero aliquid etiam tale adjiciatur, servari quidem pactum.

(b) In considering the rules of interpretation, the civil law and the law of *England* were shewn to be at variance in respect to this principle.

had

had acted, the benefit of division (a) whilst they all continued solvent. But these exceptions are not in use with us: therefore when *Dumoulin* says, that tutors have the benefit of division for the payment of what remains due on account of their tutelage, except in the case where they are debtors *ex dolo*, he ought to be understood as speaking of the places which follow the disposition of the *Roman* law.

[268] The third case of obligations in solido is where several persons have concurred in an injury, and are each liable to the reparation of it.

They cannot oppose any exception of discussion or division, being unworthy of it.

[269] An obligation in solido may also result from testaments, when the testator declares, that he charges his heirs or other successors in that manner, with the performance of the legacy.

Even without its being expressed, those whom the testator charges with a legacy are bound in solido, when the testator makes use of a disjunctive expression; as if he were to say, my son *Peter*, or my son *John*, shall give such an one ten pounds. This is decided in law 8. § 1. *ff. de Legat. 1. si ita scriptum est, TITIVS HERES MEVS AVT MÆVIVS HERES MEVS DECEM SEIO DATO: cum utro velit, Scius agit, ut si cum uno actum sit et solutum, alter liberetur; quasi si duo rei promittendi in solidum obligati fuissent.* Nevertheless, *Dumoulin* insists that this is not perfectly an obligation in solido; that it is true that each of them is subject to the whole of the legacy, and in this respect they resemble debtors in solido; but they are not strictly such, and their obligation has not the other effects of obligations in solido. For instance, if two heirs were charged in this manner with the delivery of a specific thing, which had perished through the fault of one of them, he does not think that the other would be answerable for the loss, as a debtor in solido would. In this respect *Dumoulin* deviates from the common opinion maintained by *Bartholus* and the other doctors, who allow the case stated in this law to be that of a real obligation in solido. *Dumoulin* founds his opinion upon these terms, *quasi si duo rei*, which indicate, says he, that the two heirs are not really *correi*, the adverb *quasi* being *adverbium improprietatis*. I should rather incline in favour of the opinion of *Bartholus*, the heirs being in this case debtors of the whole, not on account of the quality of the thing due, but by the will of the testator, who chose that each should be charged with the entire performance of the legacy; their obligation appears

(a) A right of requiring the minor to proceed against each separately for their separate shares.

to have all the character of a real obligation in solido, and I do not see any thing to make a difference between them. The term *quasi* does not appear to have been used *pro adverbio improprietatis*, but as equivalent to *quemadmodum*; these two heirs are obliged in solido, in the same manner as they are obliged by a stipulation. For it is not only by stipulations that obligations may be contracted in solido, *non tantum verbis stipulationis, sed et ceteris contractibus duo rei promittendi fieri possunt. l. 9. ff. de duob. reis*; and testaments as well as contracts may form these obligations.

§ III. Of the Effects of Solidity between several Debtors.

[270] These effects are, 1st. That the creditor may recover from which of the debtors he pleases, by action, if the debt only lies in action; or by distress, if it lies in execution, the whole that is due; this is a necessary consequence of each of the debtors being such for the whole.

I do not think that the debtors would have even the benefit of division; that is to say, that any one from whom the creditor makes his demand may be allowed, upon offering his own part, to require that the creditor should proceed against the others for their respective parts, supposing them to be solvent. The acts of notaries commonly contain a clause renouncing this benefit, but even if there is no such clause, I do not think that it would be allowed.

[271] Observe, that the choice which the creditor makes of one of the debtors against whom he exercises his pursuits, does not liberate the others until he is paid: he may discontinue his pursuits against the first, and proceed against the others; or if he pleases he may proceed against them all at the same time. *l. 28. Cod. de Fidej. (a).*

[272] The judicial demand which is made against one of the debtors in solido, interrupts the course of prescription

(a) Generaliter sancimus, quemadmodum in mandatoribus statutum est, ut contestatione contra unum ex his facta, alter non libereur: ita & in fidejussoribus observari.

Invenimus enim, & in fidejussorum cautionibus plerumque ex pacto hujusmodi causæ esse prospectum, & ideo generali lege sancimus, nullo modo electione unius ex fidejussoribus, vel ipsius rei alterum liberari; vel ipsum reum fidejussoribus, vel uno ex his electo, liberationem mereri, nisi satisfiat creditori; sed manere jus integrum donec in solidum ei pecuniæ persolvantur, vel alio modo satis ei fiat. Idemque in duobus reis promittendi constituimus, ex unius rei electione præjudicium creditori adversus alium fieri non concedentes. Sed remanere et ipsi creditori actiones integras et personales et hypothecarias, donec per omnia ei satisfiat. Si enim pactis conventis hoc fieri conceditur, et in usu quotidiano semper hoc verari aspiciamus, quare non ipsa legis auctoritate hoc permitatur, ut nec simplicitas suscipientium contractus ex quacunque causa possit jus creditoris mutilare.

against all the others. *l. fin. cod. de duob. reis. (a)*. It is also a consequence of each of the debtors being a debtor for the whole : for the creditor, by instituting this proceeding, has instituted it for the whole of the debt, even as against the other debtors who cannot oppose a prescription against the creditors, except upon the ground of his not having exercised his right to the debt for which they are bound ; but this they cannot allege, for the debt for which they are bound, is that for the whole of which the creditor has instituted his demand.

[273] For the same reason, when the thing which is due has perished by the act or fault of one of the debtors in solido, or after his being put *en demeure*, the debt is perpetuated, not only as against that debtor, but as against all the others. This is decided by the law *penult. ff. de duob. reis. Ex duobus reis ejusdem Stichi promittendi factis, alterius factum alteri quoque nocet*. For instance, if *Peter* and *Paul* have jointly (*solidairement*) sold me a certain horse, and before it is delivered it dies by the fault of *Peter*, *Paul* continues the debtor as well as *Peter*, and I may demand the value of the horse from him as well as from *Peter*, leaving him to his remedy against *Peter*; whereas if they had sold it without solidity, *Peter* alone would be answerable for his own fault, and *Paul* would, by the death of the horse, though it was occasioned by the fault of *Peter*, be entirely liberated from his obligation, and would still be a creditor for a moiety of the price, for which the horse was sold, in the same manner as if the death had been occasioned by an accident merely fortuitous.

Observe, that the act, the neglect or the delay of one of the debtors in solido, affects in truth his co-debtors *ad conservandam et perpetuandam obligationem*; that is to say, so that they are not discharged from their obligation by the loss of the thing, and are bound to pay the value of it. It is in this sense that the law *penult. ff. de duob. reis*, says, *alterius factum alteri quoque nocet*: but the act, the neglect, or the delay of one of them does not affect the others *ad augendam ipsorum obligationem*; that is to say, that he only who has committed the fault, or has been put *en demeure*, ought to be subject to damages resulting from the non-performance of the obligation, beyond the value of the thing which is due. With respect to the other debtor, who has not committed any fault, and has not been put *en demeure*, he is only bound to pay the value of the thing which is lost by the fault, or after the *demeure* of his creditor. For the same reason the person alone who has been put *en demeure*, ought to be liable for the damages arising from the delay. It is in this sense that the law 32. *ff. de Usuris*, says, *si duo rei promittendi sint, alterius mora alteri non nocet*.

(a) See *supra*, n. 260. p. p. 144, 145.

Dumoulin. restrains the decision of this law to damages which have not been expressly stipulated; for if they had been so, the act or delay of one of them makes the condition, upon which they were all obliged, attach.

[274] The payment which is made by one of the debtors, liberates all the others; this is a consequence of the principle, that a debt in solido is only one debt of the same thing, of which there are several debtors.

Not only a real payment, but every other kind of payment ought to have this effect; therefore if one of the debtors in solido, being sued by the creditor, opposes, in compensation of the debt demanded, a like sum owing to him from the creditor, the other debtors are liberated by this compensation, as well as by a real payment.

Peter and *Paul* are my debtors in solido of a sum of one thousand pounds; afterwards I become the debtor of *Peter* of the like sum; if I sue *Peter* for the payment of the thousand pounds due to me, and he opposes the compensation of the debt due to him, this compensation, as we have seen, being equivalent to a payment, the debt due to me from *Peter* and *Paul* becomes extinct, as against them both. But if I do not sue *Peter*, and do sue *Paul*, for the payment of this money, can he oppose, by way of compensation, the debt which is owing from me to *Peter*? *Papinian* in law 10. ff. *de duobus reis*, decides in the negative, *si duo rei promittendi socii non sint, non proderit alteri, quod stipulator alteri reo pecuniam debet*.

Nevertheless, *Domat*, in his Civil Law, p. 1. l. 3. t. 3 § 1. art. 8. decides against this text, that *Paul* may oppose the compensation of what I owe to *Peter*, so far as *Peter* is debtor as between him and *Paul*, and no further. The reason is, that *Peter* no longer owing me that part of the debt for which he was bound, by reason of the compensation which he has a right to oppose; *Paul* ought not to be obliged to pay for *Peter*, that part of which *Peter* is discharged by the compensation. This reason is not entirely conclusive: for when a debtor in solido pays the whole of the debt, it is only in respect of the co-debtors, that he is considered as paying on their behalf their shares of the debt; but, such a debtor being in respect of the creditor a debtor of the whole, when he pays the whole it is not, so far as the creditor is concerned, a payment of the parts of the co-debtors: he pays what he owes himself; and consequently he can only oppose in compensation what is due to himself, and not what is due to his co-debtors; and upon this reason is founded the decision of *Papinian*. It may be said in favour of the opinion of *Domat*, that it prevents circuitry; for when *Paul* has paid me the whole of the debt, which he owes in solido with *Peter*, he will

have recourse against *Peter* for his share ; and for this purpose he will attach, in my hands, what I owe to *Peter*, and will make me restore, so far as that extends, what I have received. This last reason ought to make the opinion of *Domat* be adopted in practice.

[275] The release of the creditor to one of the debtors, would also liberate the others, if it appeared that the creditor intended thereby to extinguish the debt as to the whole.

If it appeared that his intention was only to extinguish the debt, as to the part for which the person to whom he gave the release was liable to his co-debtors, and to discharge that one personally from the residue of the debt, the debt would still continue to subsist, as to the residue, in the co-debtors.

If the creditor, in the discharge which he gave to his co-debtor, expressly declared that he intended only to discharge the person of the particular debtor, and to retain his claim against the others ; could he, by virtue of this declaration, require the whole from the other debtors, without deducting the part of him who was discharged ? I think he could not ; the several debtors would not have bound themselves in solido, but would only have engaged for their own respective parts, if they had not considered, that on paying the whole, they should have recourse against the others ; and that for this purpose they would be entitled to a cession of the actions of the creditor for the other parts. It is only under the tacit condition of having this cession of actions, that they are obliged in solido ; and consequently the creditor has no right to demand from any of them the payment of the whole, without such cession. In this case, the creditor having put it out of his power to cede his action against the debtor whom he has discharged, and consequently having incapacitated himself from performing the condition upon which he has a right to demand the whole, it follows that he cannot demand the whole from each of them. See *infra*, P. III. c. 1. Art. vi. § 2.

When there are several debtors in solido, and the creditor discharges one of them, can he proceed against each of the others in solido, subject only to a deduction of the share of the one who is discharged, and of that proportion to which the one who is discharged would be liable as between themselves, for the share of any of the others who were insolvent ? For instance, supposing that I had six debtors in solido, that I discharged one, that there remained five, of whom one is insolvent ; can I only proceed against each of the others for their sixth part ? Or may I proceed against each of those who are solvent for the whole, subject only to the deduction of the sixth, for which the person discharged was originally bound, and of his share in the portion of the one who had become insolvent ?

insolvent? I think I should be well founded in doing so, for the debtor against whom I proceed cannot claim from me any other deduction, than the amount of what he loses by not having a cession of actions against the one whom I have discharged. Now the cession of actions against him would only give a right of repetition as to his portion, and a right of contribution, in respect to the share of the insolvent.

[276] When one of the debtors in solido becomes the only heir of the creditor, the debt is not thereby extinguished against the others; for the confusion or union of characters, *magis personam debitoris eximit ab obligatione, quam extinguit obligationem*. But this heir cannot demand the debt from the other debtors, without deducting the proportion for which he is liable in respect to them; and if any of them is insolvent, he ought besides to bear his proportion of the share of the insolvent. It is the same in the opposite case, where the creditor becomes the only heir of one of the debtors.

§ IV. Of Release of Solidity.

[277] The right of solidity which a creditor has against several debtors of the same debt, being a right established in his favour, it is clear that, according to the maxim, *cuique licet juri in suam favorem introducto renunciare*, a creditor of full age, who has the free disposition of his effects, may renounce the right of solidity, either in favour of all the debtors, by consenting that the debt shall be divided between them, or in favour of any one of them, whom he discharges from the solidity, retaining his right of solidity against the others; but so that the discharge of the one shall not operate to the prejudice of the rest, as has been observed. No. 275.

He may renounce it either by an express agreement, or tacitly.

He is presumed to have renounced it tacitly, when he has admitted any one of the debtors to pay *for his part* by name. This is the decision of law 18. *Cod. de post. Si creditores vestros ex PARTE debiti admisisse quemquam vestrum pro sua persona solventem probaveritis, aditus rector provinciae pro sua gravitate, ne alter pro altero exigatur providebit.*

The reason is, that when the creditor gives an acquittance in these terms: *I have received from ——— the sum of ——— for his part*, he acknowledges him as his debtor *for a part*, and consequently he consents that he shall not be liable in solido, it being inconsistent that a person should be debtor for a part, and debtor in solido.

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This decision does not apply if the acquittance declares the creditor to have received so much from the debtor for his part, reserving the right of solidity: for the formal terms, by which the creditor reserves the right of solidity, prevail over the inference that might be drawn from the terms *for his part*, as denoting a renunciation of the right; and even if it were allowed that the terms, *for his part*, were as formal in favour of the renunciation of solidity, as the express reservation is against it; it would only follow that the two expressions would mutually defeat each other, and the acquittance would be regarded as if it contained neither the one nor the other; in which case it would not prejudice the right of solidity. This is the reasoning of *Alciat* in *d. l. 18*.

It may perhaps be objected, that the terms, *without prejudice to the solidity*, ought to be understood of the right against the other debtors, and not against the one to whom he gives the acquittance, by which means the two expressions may be reconciled together. But this argument is not of any weight: when a person, in an acquittance, or any other act, reserves his rights, without saying against whom; it is natural to understand the rights of the person with whom he treats, to whom he gives the acquittance, and not those which he has against other persons. The terms, *for his part*, are reconciled with the reservation of solidity, in a much more natural manner, by holding that the creditor meant, not a part for which the debtor would be answerable, in respect of him (the creditor,) but a part for which he would be answerable in respect of his co-debtors; which part the creditor consents to receive from him at present, saving the right to claim from him the residue, which he already has, and which he intends to reserve. This is one of the points adjudged by an arrêt of the 6th September 1712, reported in the 16th vol. of the Journal of Audiences.

When the acquittance is *without prejudice to my rights*, it is the same thing as if it had said *without prejudice to the solidity*: for the right of solidity is included in the general terms; and it is even the right which has the greatest relation to the acquittance that is given, and which serves to correct the terms, *for his part*, employed in the acquittance.

When the creditor has given one of his debtors in solido an acquittance purely and simply for a certain sum, which is precisely the amount for which he is liable with respect to his co-debtors, without expressing that it is *for his part*, is the creditor presumed to have released his right of solidity? I think it ought not to be so presumed, and that the decision of the law, *si creditores*, above cited, ought to be restrained to the particular case, which is where one of the debtors is expressly admitted to pay for his own particular

ticular share, *ex parte pro personâ suâ*; and that it is from the expression in the acquittance, *for his part*, that the presumption of renouncing the solidity arises.

But admitting it to be true, that the creditor intended to receive from one of his debtors a part of the debt amounting to the whole of that debtor's particular share, it is not from thence alone to be concluded that he intended to discharge him from the solidity: for there is no necessity for drawing that conclusion; and it ought not to be drawn without necessity, as no person is to be presumed to give up his rights, *nemo presumitur donare*. This is decided in the law 8. § 1. ff. de Legat. 2. in the case of two heirs whom the testator had charged in solido with a legacy. *Pomponius* decides, that the legatee, who had demanded, or even received from one of them, his proportion is not presumed to have thereby discharged him from the solidity, but that he may still require the surplus. *Quid, si ab altero partem petierit? Liberum erit ab alterutro reliquum petere; idem erit et si alter partem solvisset.* *Bacquet* in his *Treatise Des Droits de Justice*, and *Basnage tr. des Hypotheques*, are of this opinion.

Bartholus. pretends, that there is in this respect a difference between debtors in solido, by testament, and those who are so by other transactions; but this distinction is not founded upon any solid reason.

Observe, that these terms of the law, *idem erit & si alter partem solvisset*, ought to be understood of the case in which the creditor, without having made any demand, voluntarily receives from one of the debtors the sum to which that debtor's proportion amounts, without expressing it to be received for his part.

When a creditor proceeds by commandment against one of his debtors in solido, or when he assigns him to pay *his part of the debt*, is he deemed thereby to have divided the debt, and to have discharged the debtor from the solidity? The doctors are divided upon this question; *Baldus* is for the affirmative, *Bartholus* for the negative. For the affirmative it may be said, that there is the same reason for so deciding in this case, as in the case of the law *si creditores*, above referred to. In the case of that law, the creditor who has expressed in formal terms, in the acquittance given to one of the debtors, that he received so much *for his part*, has by these terms acknowledged and agreed, that he was only debtor for a part; and consequently that he was not a debtor in solido, as the being a debtor for a part is contradictory to being debtor in solido. Now, when a creditor has expressed, in his judicial demand against one of the debtors in solido, that he demands such a sum for his part, may it not be said in the same manner, that by these terms he consents

consents that the debtor shall be no longer bound in solido? consequently there appears to be in this case the same reason for deciding, that the creditor discharged him from the solidity, as in the law *si creditores*. On the other side it is usual to allege the law, *Reus*, 23. *Cod. de Fid. (a)*. and the law 8 § 1. *ff. de Legat. 1. (b)* above cited. The law *Reus* does not appear in any manner to decide the question; but the law 8 § 1. formally decides that a debtor is not discharged from solidity by the demand of the creditor, to pay his part; because it decides, that notwithstanding the demand made in this manner, the creditor is not precluded from demanding the surplus from one or other of the debtors, and consequently even from him of whom he had first demanded his part. *Quid si altera partem petierit? liberum erit ab alterutro reliquum petere.* The reason is, that debts being contracted by the concurrence of the intention of the debtor and creditor, a release can only take place by an opposite concurrence of the same parties. P. III. c. 3. Art. I. § 3 Hence it follows, that in supposing that a demand made upon one of the debtors in solido, to pay *his part*, would include an intention in the creditor to release him from the solidity; yet so long as the will of the debtor does not concur with that of the creditor, so long as the debtor does not acquiesce in the demand, and consequently offer to pay his part, this demand cannot acquire any right to the debtor, nor discharge him from the solidity, nor consequently prevent the creditor increasing his conclusions against him, and demanding the whole of the debt. Herein this case differs from that of the law *si creditores*, in which the will of the debtor paying his part of the debt to the creditor, who is willing to be satisfied with it, concurs with that of the creditor for the release of the residue.

When a debtor against whom a demand is instituted for the payment of his part, before the creditor has increased his conclusions against him, has paid his part, or only offered to pay it; it appears to me that in this case there is an entire parity of reason for deciding as in the law *si creditores*, for the release of the solidity. Therefore I think that these last terms of the law 8 § 1. *ff. de Legat. idemque erit & si alter partem solvisset*, which make a separate division of the paragraph, ought to be restrained to the case of a voluntary payment made without the acquittance expressing that the creditor receives it *for his part*, and ought not to be extended to

(a) *Reus principales, vel mandatores simpliciter acceptos eligere, vel pro parte convenire, vel satis non faciente contra quem operas primo, post [illum] ad alium reverti (cum nullus de his electione liberetur) licet.*

(b) See above, p. 156, n. 277.

a payment made in consequence of a pursuit made against the debtor for the payment of *his part*.

So, where upon a demand of the creditor against one of the debtors for the payment of *his part*, there is a sentence adjudging him to pay his part, the creditor can no longer demand the remainder; the sentence in this case is equivalent to the will of the creditor in releasing the surplus, *cum in judiciis quasi contrahimus, et judicatum quamdam novationem inducat*.

[278] When there are more than two debtors in solido, does the acquittance given to one of them for a sum of money, with the expression, that it is for the payment of his part, discharge from the solidity all the debtors, or only the one to whom it is given? The doctors are also divided upon this question: the ancient doctors held the affirmative, and founded themselves upon the law, *si creditores*, above cited. *Pierre de Letoile*, a celebrated professor of the university of Orleans, was the first, according to *Alciat, ad d. Leg.* who held the negative; his sentiment appears to be the better, and more conformable to the principles of law. The law *si creditores*, if well understood, does not prove the contrary; this law is founded upon an agreement which is presumed to have tacitly intervened for the discharge of the solidity between the creditor and the debtor to whom the acquittance is given. Now it is one of the clearest principles of law, that no right can be acquired by agreements, except between the parties between whom they intervene, *sup. n. 85. & seq.* Hence it follows, that such an acquittance cannot procure a discharge from the solidity, except to the debtor to whom it is given, who is the only one with whom the creditor has treated, and not to the others, with whom the creditor has not in this respect had any agreement; the favour of the creditor towards one of his debtors, by admitting him to pay the debt for his own part only, ought not to prejudice him in respect of the others: *bonitas creditoris*, says *Alciat*, *non debet esse ei captiosa*. The law, *si creditores*, relied upon by the ancient doctors, has no reference to this question, it even seems that in the case of that law there were only two debtors; if there had been more, the Emperor would have said, *rektor providebit ne unus pro ceteris exigatur*. These terms, *ne alter pro altero exigatur*, designate two debtors only, and are to be understood in this sense, *ne alter qui solvit, pro altero qui nondum solvit, exigatur*.

But this decision ought to be followed with the qualification, that if amongst the remaining debtors any one is insolvent, the others ought to be discharged from the share which the one who was released from the solidity, would have borne in the insolvency: for

for if they ought not to profit by this discharge, neither ought they to be prejudiced by it. Nevertheless it must be admitted that *Bacquet*, after having said that the opinion of *Letoile* appeared to him equitable, allowed that the contrary opinion, which is that of the ancient doctors, is followed at the Chatelet of *Paris*, but I think that this is an error which ought to be reformed, if it has not already been so.

When the creditor has obtained a judgment against the other debtor for the payment of his part of the debt, it ought to be decided according to the same principles, that the sentence shall not discharge the solidity of the other debtors, *cum res judicata aliis non profit*; and they can only require that, if any of them is insolvent, the creditor shall allow a deduction of the share which the party discharged would have borne in the loss arising from the insolvency.

[279] There remains another question, which is, whether when there are several debtors in solido of an annuity, the acquittance which the creditor gives to one of them of such a sum, for his part of the arrears that were then due, discharges him from the solidity for the future, or only for the arrears for which the acquittance has been given? It must be decided, that it only discharges him from the arrears, and not in respect to the future payments. This decision is founded upon the principle above established, that *Nemo faciliè præsumitur donare*. Hence it follows, that you cannot from such an acquittance, draw the inference that he intended to discharge the debtor from the solidity of the annuity for the future, unless there be a necessity for doing so. Now there is not any such necessity; for, from the creditor agreeing to let the debtor pay *for his part*, nothing more follows than that he intended to discharge him from the solidity as to such arrears; but it by no means follows, that he intended to discharge him from it for the future.

Nevertheless, if during the time requisite for forming a prescription, that is to say, for the space of thirty years, the debtor had always been admitted to pay the arrears *for his part*, he would acquire by the prescription a discharge from the solidity even for the future. But even in this case, the debtor would not acquire a right of redemption *for his part* of his annuity only; for it by no means follows, from the creditor intending to discharge him from the solidity in respect to the annual payments, that he also consented to a division in the redemption of his annuity.

§ V. *Of the Cession of the Actions of the Creditor, which a Debtor in Solido, who pays the whole, has a Right to demand.*

[280] The debtor in solido, who pays the whole, may avoid absolutely extinguishing the debt, except as to the part for which he is liable on his own account, without having any remedy over. *vi. ante* No. 264. He has a right to the cession of the actions of the creditor against the other debtors; and by this cession of actions he is considered in some degree as purchasing the right of the creditor. *Creditor non in solutum accepit, sed quodam modo nomen creditoris vendidit. l. 36. ff. de Fidej.*

The creditor cannot refuse this subrogation or cession of actions, to the debtor who pays the whole; but if he has incapacitated himself from ceding them against any one, he has so far given up his right of solidity.

And further, when the debtor, by the *act* [or written instrument] of payment, requires a subrogation, though the creditor expressly refuses it, the debtor, according to our usage is, nevertheless, entitled to enjoy it without being under the necessity of instituting any process to compel the creditor to grant it: the law in this case supplies what the creditor ought to have done and gives the debtor who requires it, a subrogation to all the rights and actions of the creditor.

Suppose the debtor had paid without requiring a subrogation? He could not afterwards be subrogated to the actions of the creditor; for the pure and simple payment which he had made, having entirely extinguished the credit and all the rights and actions resulting from it, that credit cannot afterwards be ceded which does not any longer exist. *Si post solutum sine ullo pacto, omne quod ex causâ tutelæ debetur, actiones post aliquot intervallum, cessæ sint, nihil ea cessione actum, cum nulla actio superfuit. l. 76. ff. de Solut.*

The doctors, amongst other texts, commonly cite this law, to decide that subrogation is not made of full right, if it is not required at the time of the payment being made by a debtor in solido, or a surety, or any other person who pays what he owes for others or with others; and this text appears in effect to decide it in terms sufficiently formal. Nevertheless, *Dumoulin* has maintained, against the sentiment of all the doctors, that a debtor in solido, a surety, and generally, all those who pay what they owe, with, or for others, are thereby subrogated of full right, and without demanding a subrogation. His reason is, that they ought always to be presumed to have only paid, subject to this subrogation which they had a right to demand, nobody being presumed to neglect and renounce his rights; he contends, that this law is not, as has been thought

thought by all others, referable to the case of a tutor who has paid the balance which he owed in solido with his co-tutors, without requiring a subrogation against them ; but that it relates to the friend of a tutor who has paid for him, and who was not chargeable with the debt. *Dumoulin* maintains, that it is only in this case that there is no subrogation, if the acquittance does not mention any ; because, as the creditor in this case is not obliged to cede his actions, such a cession cannot be presumed, unless it is expressly agreed upon. But wherever a payment is made by a person who has an interest in paying, and consequently a right to require a subrogation of the actions of the creditor against those for whom, or with whom he is debtor, he contends that he ought always to be considered as subrogated, although he has not required any subrogation : he founds his opinion principally upon law 1 § 13. *ff. de Tutelis & Rationibus*, which he understands in a sense entirely different from that which has been always ascribed to it. It is said, *Si forte quis ex facto alterius tutoris condemnatus prestiterit, vel ex communi gestu, nec ei mandate sunt actiones, constitutum est a Divo Pio & ab Imperatore nostro & patre ejus, utilem actionem adversus con-tutorem dandam*. This text is commonly understood of the *actio utilis negotiorum gestorum*, which these Constitutions grant, in this case, to the tutor against his co-tutors ; which action had created the difficulty, because the tutor in paying what he was condemned to pay in his own name, *non con-tutoris, sed magis proprium negotium gessisse videbatur*. *Dumoulin*, on the contrary, understands this text of the action of tutelage, which the minor had against the other tutor, which was called *utilis*, because the law *utilitate suadente*, in default of an express cession, subrogates the tutor who has paid.

This opinion of *Dumoulin* has not prevailed ; and the instructions of the schools, and the practice of the bar, have continued to proceed upon the principle, that a debtor in solido, as well as sureties, and all those who pay with, or for others, are not subrogated to the actions of the creditor, unless they require such subrogation. The reason is, that according to a principle admitted by *Dumoulin* himself, there is no subrogation of full right, except where the law particularly so declares, *non transeunt actiones, nisi in casibus jure expressis*. Now *Dumoulin* cannot find any text of law which establishes a subrogation in this case ; the law 1 § 13. *de Tutel. & Rat.* which is the principal foundation of his opinion, does not establish it ; there being no necessity to understand the text in the sense in which it is understood by *Dumoulin*, of an *actio utilis tutela*, to which the tutor who has paid is subrogated ; as it may be understood much more naturally of the *actio utilis negotiorum gestorum*. The text is so far from establishing, that subrogation is

made in this case of full right, that it supposes the contrary, which is also supposed in the law 76. *ff. de Solut.* above cited, taken in its natural sense, which the sense ascribed to it by *Dumoulin* is not, by any means. The law 39. *ff. de Fidej.* (a) and the law 11. *Cod. d. Tit.* (b) admit of still less reply: these laws decide, that the surety, who at the time of payment has omitted to require a subrogation, has not an action against his co-sureties, which clearly supposes that he is not subrogated of full right, without requiring a subrogation; as if he was so, it would have been useless to consult the Emperor *Alexander*, whether he had an action. In vain will it be said, in support of the opinion of *Dumoulin*, that the debtor in solido, having a right to be subrogated to the action of the creditor against his co-debtors, he ought not to be presumed to have renounced this right, it being a principle, that nobody is presumed to renounce the rights which belong to him. The answer is, that as this right consists in the mere power to require a subrogation, which power he may use or not, it is not sufficient to say that he shall not be presumed to have renounced his right; it must appear that he has used this power, which does not appear, unless he has declared himself to do so. The debtor, having another motive for his payment, than that of acquiring a subrogation, to wit, the avoiding the pursuits of his creditors, and the liberating his own person and effects, the payment which he makes without requiring a subrogation, does not establish any thing more than that he intended to liberate himself. Besides, even if he were supposed to have intended to require a subrogation, this intention, kept to himself, would not be sufficient; as his right consists in the power to require it, the subrogation can only take place, if it is required. It is true, that the law allows it in case of the default of the creditor; but before it can be said that there is a default in the creditor, the creditor must have been put *en demeure* to grant it, by a requisition made to him for that purpose. For these reasons, the modern writers have continued to retain the common opinion.

Remusson, in his *Traité des Subrogations*, holds this opinion; it has also been followed by the jurisprudence of *arrêts*; there is one of the 26th of *August* 1706, reported in the 5th vol. of the *Journal des Audiences*, which adjudged, that a surety, paying without

(a) Ut fidejussor adversus confidejussorem suum agat, danda actio non est: ideoque si ex duobus fidejussoribus ejusdem quantitatis, cum alter electus a creditore totum exsolvet, nec ei cessat sunt actiones: alter nec a creditore, nec a confidejussore convenietur.

(b) Cum alter ex fidejussoribus in solidum debito satisfaciat, actio ei adversus eum, qui una fidejussit, non competit. Potuisti sane, cum fisco solveres, desiderare, ut jus pignoris, quod fiscus habuit, in te transferretur: et si hoc ita factum est, cessis actionibus tui poteris. Quod et in privatis actibus observandum est.

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requiring a subrogation, was not subrogated to the actions of the creditor ; and that consequently he had no action against the wife of the debtor, who had engaged to the creditor to return her husband to prison, or to pay for him.

[281] The debtor in solido, who on paying the debt requires a subrogation, is, as to the surplus, beyond his own share subrogated not only against his co-debtors, but also against their sureties : *if they have given any to the creditor*, he is likewise subrogated, to all the privileges and rights of hypothecation attached to the actions of the creditor ; and he may even exercise them against third persons, in the same manner as the creditor to whom he is procurator *in rem suam* might have done.

Where there are several co-debtors, as for example, when an obligation has been contracted in solido by four persons ; it is a controverted question amongst the doctors, whether one of the four, who has paid the whole of the debt with a subrogation, may proceed in solido against each of the others, subject only to the deduction of the fourth part, for which he was liable on his own account, or whether he can only proceed against each for his fourth ? The question was anciently judged in favour of the first opinion. In fact, it seems at first, that the debtor being, by the subrogation, the procurator *in rem suam* of the creditor, he may exercise the actions of the creditor in solido, against each of the debtors in the same manner as the creditor might himself ; nevertheless, the modern *arrêts* have decided in favour of the second opinion. The author of the *Journal du Palais*, t. 1. p. 215, of the edition of 1701, reports one of the 22d of Feb. 1650, which was followed by another of the 5th Sept. 1674. The reason is, that otherwise there would be a circuitry of actions : for either of my co-debtors, whom I had obliged to pay the whole of the debt, deducting my own share, would have a right in like manner to be subrogated to the actions of the creditor, subject to the deduction of the share for which he was liable ; and by virtue of that subrogation he would have a right to demand from me, deducting his own share, what he had before paid me, since I am also bound by the solidity. I could not say, in order to avoid this circuitry, that I am no longer a debtor, having paid the creditor : for, in consequence of the subrogation, the payment has only extinguished the debt as to the part for which I was liable on my own account, and not as to the residue. By means of the subrogation, I have rather acquired the claim of the creditor for the surplus, than discharged it ; but being reimbursed by my co-debtor, who would also have required a subrogation, this claim for the surplus, and subject to the deduction of the part for which he was liable on his own

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account, would pass to him; the other would then become instead of me the procurator in *rem suam* of the creditor, and he would have a right in that quality to exercise against me the actions of the creditor for the surplus, and to make me restore what he had paid.

If, after I had paid the whole with a subrogation, it appeared that one of my co-debtors was insolvent, and that I could not recover the part of the debt for which he was liable, this insolvency ought to fall equally upon the other solvent debtors and myself; as it is contrary to equity, that, in consequence of having alone discharged the common debt, I alone should bear the loss of the insolvency.

§ VI. *Of the Actions which a Debtor in Solido, who has paid without Subrogation, may have on his own Account (de son chef) against his Co-debtors.*

[282] Although a debtor in solido has omitted at the time of payment to require a subrogation, he is not therefore destitute of all redress; but has on his own account (*de son chef*) an action against each of his co-debtors, for the repetition of their several proportions.

This action is different, according to the different causes upon which the debt may be founded.

When the debt in solido is contracted by several persons for a common affair; as when several persons have made a joint purchase of an estate, for the payment of which they have bound themselves in solido; or when they have borrowed a sum of money which they have employed about their common affairs, or have divided amongst themselves, and bound themselves in solido for the payment of; in these, and similar cases, the debtor, who has paid the whole, has against each of the others the action *pro socio*.

He has this action against each of them, for the share which they respectively had in the common subject, which is the foundation of the debt.

If any one of them is insolvent, he who has paid the whole has likewise an action against each of those who are solvent, to pay the proportion which they ought respectively to bear of the loss arising from such insolvency; and to which each of them ought to contribute *pro rata*, according to the share which he has in the common subject: for the insolvency of any one is a loss to the body at large, which ought consequently to fall upon each of the members in proportion to his share.

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This may be illustrated by an example. Suppose six persons, *Peter, Paul, James, Andrew, John* and *Thomas*, purchased a lot of merchandize together, for the sum of 1000*l.* for the payment whereof they oblige themselves in solido to the seller. By the division which is made between themselves, *Peter* takes one moiety for his share, and engages for the payment of a moiety of the price; the five others divide the other moiety in equal shares. *Thomas* pays the creditor the whole price without subrogation, *Andrew* is insolvent; *Thomas*, who in respect of his co-debtors only owed 100*l.* for his own tenth, and 12*l.* 10*s.* for his fourth of the moiety of the share of *Andrew*, will recover against *Peter*, 1*st* 500*l.* for the moiety for which *Peter* was liable on his own account, 2*d* 50*l.* for the moiety of *Peter* in the share of *Andrew*, and he will recover against each of the three others, *Paul, James* and *John* 100*l.* on their own account, and 12*l.* 10*s.* for the share which each of them ought to bear in the portion of the insolvent.

When the affair, for which the debt has been contracted by several who are bound in solido, only concerns one of them, although they are all, in respect of the creditor, principal debtors; as between themselves, the only debtor is the one whom the affair concerns, and the others are only in effect his sureties. For instance, if *Peter, James* and *John*, borrow a sum of money, which they oblige themselves in solido to repay, and *Peter* has the whole of the money; *Peter* is, in respect of the others, the only principal debtor. If he discharges the debt, he has no recourse against them, they having only made themselves debtors on his behalf, (*pour lui faire plaisir*). On the contrary, if either *James* or *John* discharges the debt, he will have an action *mandati* against *Peter* to recover the whole, in the same manner as a surety has the action *mandati*, against the principal debtor when he has discharged the debt (a).

But, in case of the insolvency of *Peter*, shall *James*, who has paid the whole, have an action against *John* for a moiety? That depends upon the decision of the question, whether a surety has an action against his co-sureties. As to which, see *infra*, ch. 6. § 7. Art. iv.

When the debt in solido is founded upon a donation, as when two or three, by a marriage-contract, engage in solido to give a certain sum by way of portion, and one of them pays the whole, he cannot have the action *pro socio* against the co-debtors: for partnership may be contracted in buying together, in selling to-

(a) In *England*, the terms, principal and surety, would be immediately applied to the case as here stated; and, in fact, the ordinary mode of a surety contracting is by a joint and several engagement with his principal. It seems that, according to the *Roman* and *French* law, some particular form was used for the engagements of sureties, (*fidejussores*) (*cautions*). For the system adopted respecting them, see post. chap. 6.

gether, but not in giving together; partnership being in its nature a contract which is made *lucris in commune querendi causa*. The action, which in this case belongs to the one who pays the whole, is the *actio mandati*; for each of the donors and debtors is only donor and debtor for himself, to the amount of his own share, and for the remainder is only the surety and mandatory of the others; and consequently he has for that the *actio mandati*, in the same manner as a surety.

When the debt in solido proceeds from an injury, as when several persons are condemned in solido, to pay another a sum of money for the injury which they have committed, he who pays the whole cannot have, against the others, either of the actions *pro socio* or *mandati*: *Non enim ulla societas malefactorum*, l. 1. § 14. ff. *Tut. & Rat. nec societas. aut mandatum flagitiosæ rei ullas vires habet*, l. 35. § 2. *de Contrab. Imp. rei turpis nullum mandatum est*. l. 6. § 3. ff. *Mandat*. According to the scrupulous principles of the Roman jurists, the debtor, who has paid the whole, has not any recourse against the others.

The French practice is more indulgent in this respect, and gives the person, who pays the whole, an action against each of the others for their respective parts. This action is not founded upon the injury which they have committed together, *nemo enim ex delicto consequi potest actionem*: It arises from the payment made by him of a debt which was common to himself, and the others; and from the principle of equity, which does not allow his co-debtors to enjoy, at his expence, the liberation from a debt for which they were as much bound as he was. It is a kind of *actio utilis negotiorum gestorum*, founded upon the same reasons of equity as the action which in our jurisprudence is allowed to a surety against his co-sureties. As to which see *infra*, Part II. ch. 6. § 7. Art. iv.

C H A P. IV.

Of some particular Kinds of Obligations considered with Reference to the Objects of them.

In enumerating the divisions of Obligations, with reference to the things which are the objects of them, we observed that there were Obligations of a specific thing, such as a particular horse; and Obligations of an uncertain and indeterminate thing of a particular kind, such as a horse generally.

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We also adverted to Obligations as divisible and indivisible. In the first section of the present chapter, we shall treat of the Obligation of an indeterminate thing of a particular kind ; in the second, of divisible and indivisible Obligations.

SECTION I.

Of the Obligation of an indeterminate Thing of a particular Kind.

[283] Any thing which is absolutely indeterminate, cannot be the object of an obligation, *supra*, n. 131. For instance, if I promise to give you *something*, without saying what, the promise does not induce any obligation ; but an obligation may be contracted of an indeterminate thing of a certain kind : therefore, where a person promises to give another a horse, the furniture of a bed-chamber, a brace of pistols, without reference to any horse, furniture, or pistols in particular, the individual thing, which is the object of these obligations, is indeterminate ; but the kind to which it belongs is certain and determinate ; these obligations are indeterminate *quoad individuum*, though they have a determinate object *quoad genus*.

These obligations are more or less indeterminate, according as the kind of things which form the object of them, is more or less general ; therefore if a person engages to give me a horse from his stud, the obligation being confined to that stud is less indeterminate, than if it had been merely to give me a horse.

In these obligations, every individual comprised in the specified class, is *in facultate solutionis*, provided it is good, lawful, and merchandizable, but it is not *in obligatione* ; for there is not any individual which the debtor may not pay : but there is not any one thing which can be properly and distinctly demanded from him.

There is indeed one thing of that kind due ; for the obligation must have an object : but that thing is not any individual in the concrete, it is only a thing of that kind in the abstract, according to the transcendent idea which makes an abstraction from the individuals that compose the kind ; the thing is uncertain and indeterminate, and can only become determinate by the actual payment of a particular individual.

It is true, that the thing so considered, until it is determined by payment, only subsists intellectually ; but intellectual things may be the objects of obligations, obligations being in their nature intellectual.

This idea which *Dumoulin* gives us, *tr. de Div. & Indiv. p. 2. quest. 5.* of the object of an obligation of an indeterminate thing

of a certain kind, is more natural and correct than that of those who think that such obligations have for their object all the individuals of the kind prescribed, so that each of them is due *non quidem determinatè*, but in a kind of alternative, and upon the condition, *si alia res ejus generis non solvatur* (a).

From the principles which have been stated, it follows, 1st, That where a thing of a certain kind is due indeterminately, the creditor has no right to demand, determinately, any particular thing of that kind; but he may demand one of such things, generally and indeterminately.

2d, That the loss of any individual thing of that kind, subsequent to the obligation, does not fall upon the creditor: for the things which are lost are not such as were specifically due; the obligation subsists whilst there is any one thing remaining, by which it can be discharged.

But it must be observed, that if the debtor, in order to discharge his obligation, offers any thing of the proper kind, and of suitable quality, and has, by a judicial summons, put the creditor *en demeure* to receive it, the loss which may afterwards accrue to the thing so offered will fall upon the creditor, as the debtor ought not to suffer by the creditor's refusal or delay; the debt, however indeterminate before, becomes, by the offer, determinate; and is confined to the article offered. *l. 84. § 3. ff. de Leg. 1. (b).*

[284] It is however essential to the validity of such an offer, that the thing should be good and sufficient in its kind. *l. 33. (c) in fine, ff. de Solut.* that is, that it should not have any remarkable defect. Thus the debtor of a horse, generally, will not be allowed to offer one which is blind, or broken-winded, &c. or of an age unfit for service; with this exception, and on condition of transferring the absolute property, the choice of the particular thing belongs wholly to the debtor. *l. 72. § 5. ff. de Solut. (d).*

(a) This metaphysical discussion, though not conformable to the taste of those who expect something practical in every juridical inquiry, will not be unacceptable to such as have no aversion to trace a subject to its original source, and to acquire an accurate knowledge of its fundamental principles.

(b) Si cui homo legatus fuisset, et per legatarium stetisset, quo minus Stichum, cum heres tradere volebat, acciperet; mortuo Sticho, exceptio doli mali heredi proderit.

(c) Item, qui hominem cari promisit, & vulneratum a se offert, non liberatur. Judicio quoque accepto si hominem is, cum quo agitur, vulneratum a se offert, condemnari debet. Sed et ab alio vulneratum, si det, condemnandus erit, cum possit alium dare.

(d) Qui hominem debebat, Stichum, cui libertas ex causa fideicommissi præstanda est, solvit: non videtur liberatus, nam vel minus hic servum dedit, quam ille, qui servum nondum noxa solutum, num ergo & si vespellionem, aut alias turpem dederit hominem, idem sit? Et sane datum negare non possumus. Sed differt hæc species a prioribus; habet enim servum, qui ei auferri non possit § 6. Promissor servi cum debet hominem solvere, quem, si velit stipulator, possit ad libertatem perducere.

[285] Will he be allowed to give an article, of which a valid promise could not have been made, to the creditor in whose favour the obligation has been contracted? For instance, I engage to give you a horse indeterminately; may I acquit my obligation by giving you a horse, which belonged to you at the time of the contract, and having been sold by you, has become my property? *Dumoulin* decides in the affirmative; and in this the obligation differs from that by which I should have promised you the horse under the alternative of something else: for in this case, as my obligation could not subsist with respect to a thing which belonged to you, the other only was due; and consequently that alone is to be paid by me. But in the obligation of a horse indeterminately, no individual being due, and all horses being *in facultate solutionis* rather than *in obligatione*, the payment is sufficient if the horse then belongs, not to you but to me. *Marcellus* decides this in the law 72. § 4. ff. de Solut. *Ei qui hominem dari stipulatus est, unum etiam ex his qui tunc stipulatori servierunt dando, promissor liberetur.*

It must be agreed, however, that the law 66. § 3. ff. de Leg. 2. which is *Papinian's*, decides the contrary. *Quum duobus testamentis homo generatim legatur, qui solvete altero legatarius factus est, quamvis postea sit alienatus, ab altero herede idem solvi non poterit, eademque ratio stipulationis est; hominis enim legatus, orationis compendio singulos homines continet; ut quæ ab initio non consistit in his qui legatarii fuerunt, ita frustra solvitur cujus dominium legatarius adeptus est, tametsi dominus esse desierit.*

Dumoulin, *Tract. de Div. & Ind.* p. 2. n. 102. according to his usual custom of making the laws subservient to his decisions, tortures this law; he says, that the decision of it ought to be restricted to its particular case of two legacies, made of a thing of a certain kind by two testators to the same person, or of two gratuitous promises of a thing of a specific kind, invested with the form of a stipulation, made by two donors to one person; that it is for a particular reason, that in this instance, the same thing which was paid to the legatee or to the donee, in performance of the first legacy, or of the first donation, can no longer be paid in performance of the other legacy or donation, *ne scilicet videretur offendi juris regula, non possunt duæ causæ lucrative in eadem re & in eadem persona concurrere*; but that it ought not to be deduced as a general principle from this law, that in all obligations of a thing of a certain kind, the things which, at the time of the contract or afterwards, belonged to the person in whose favour the contract is made, are excepted from the obligation, and consequently not capable of being paid

paid to him, though no longer belonging to him. Lastly, he says; that in this law the terms, *hominis legatum, orationis compendio singulas homines continet*, do not signify that all the slaves in the world are *in obligatione legati*, under this condition, *si alius non solvatur*; but only, that all the slaves in the world are *in facultate solutionis*, and that the legacy may be acquitted and executed *in singulis hominibus*. This interpretation does not appear agreeable to the natural sense of the text: I prefer, with *Antoine Faber* and *Bachovius*, allowing a real antinomy between this law and law 72. abandoning the decision of *Papinian* as founded upon the false principle, that the obligation of a thing of a certain kind includes *alternatè & orationis compendio*, that of all the individuals which are susceptible of it, and admitting the decision of *Marcellus* in the law 72. § 4. above cited, for the reasons already mentioned. *Cujas*, in commenting upon this law, has taken a part diametrically opposite to that of *Dumoulin*; for to reconcile the laws together, and to make *Marcellus* in the law 72. *de Solut.* say the same thing, which *Papinian* says in the law 66. *ff. de Leg. 1st*, he changes the text of this law 66; but the end of the § shews the falsity of this innovation in the text, which, besides, is made without any authority.

Where a debtor, of the kind at present in consideration, pays a certain article under the erroneous belief, that it was specifically and determinately due from him, he has a right of repetition upon giving another: for, not having given the first by way of discharging a general obligation, but under the false persuasion of it's being specifically due, he has paid what was not actually due, and therefore has a right to reclaim it. *l. 32. § 3. ff. de Cond. Indeb.*

As to the indivisibility of payment of obligations of an indefinite thing of a certain kind, v. *infra*, P. III, ch. 1. Art. iv. § 3.

[286] All that we have hitherto said holds good, whether the obligation be *generis generalissimi*, as of a horse in general, or *generis subalterni aut limitati*, as one of the stud belonging to the debtor, unless the choice is taken from the debtor by express agreement.

But where it is particularly stipulated, that the creditor shall have the choice, as if my debtor give me the choice of any dog in his pack; in this case, although this agreement principally contains the pure and simple obligation of a dog indeterminately, it may also be said, that every dog in the pack is due to me under a kind of condition, provided I make choice of it; since there is not any of them which I have not a right by virtue of this clause to demand; therefore the debtor is obliged in this case to keep them all, until I have made the choice; and cannot dispose of any of them without contravention of his obligation. *Arg. l. 3. ff. qui*
& 2

Et à quib. man. si indistinctè bonno sit legatus, non potest heres quosdam munimittendo evertere jus electionis.

It cannot be said, in the like manner, where the choice is with the debtor, that every individual is comprized in the obligation, subject to the debtor's right of fixing upon one rather than the other; because the obligation does not consist in the power of paying one rather than another, but in the right of demanding it.

Dumoulin Tr. de Div. & Ind. p. 2. n. 112, 113, 114, establishes this difference between the case in which the choice is given to the creditor, and that in which it is given to the debtor.

S E C T I O N II.

Of Divisible and Indivisible Obligations (a).

A R T I C L E I.

What Obligations are Divisible, and what are Indivisible.

§ I. *What is a Divisible Obligation, and what an Indivisible one.*

[287.] A Divisible Obligation is that which which may be divided. An Indivisible Obligation is that which cannot be divided. An Obligation is not the less divisible, though it be actually undivided; for it is sufficient to render it divisible if it is capable of being divided. *Dumoulin, Tr. de Div. & Indiv. p. 3. n. 7. & seq.*

For instance, if I have singly contracted to pay you a thousand pounds, this obligation is undivided; but it is divisible, because it may be divided; and in fact will be divided among my heirs, if I leave several, and die before discharging it.

(a) By the Roman laws, when several persons contracted an obligation jointly, each was only liable for his own part, unless it was particularly stipulated that they should be bound in solido; and when a person died, leaving several heirs, each heir was only answerable for his own proportion. So, when an obligation was contracted in favour of several persons, or devolved upon several heirs of one person, each was creditor for his respective part; provided the obligation could, from its nature, be discharged in separate parts, and there was no particular reason to the contrary. Debts which might be so discharged in separate portions, by the several debtors to the several creditors, were called divisible; those which only admitted of an entire discharge were indivisible, and the nature and effects of this distinction are the subject of the present section, which manifests great ingenuity and distinctness, and is peculiarly distinguished for its perspicuous exposition of an intricate branch of law; and is therefore, as a specimen of judicial reasoning, of general value and utility; but it is evident from the above sketch of the general object of it, that it can have very little immediate application to the practice of the English law.

In

In like manner the obligation in solido, when several persons contract to pay to another the sum of ten pounds, is nevertheless a divisible obligation ; the effect of the solidity is, that it is not actually divided among the debtors in solido : but their obligation is, notwithstanding, divisible, because it may be divided, and in fact will be so, among their heirs.

[288] We are now to see what Obligations can be divided, and what cannot.

An obligation may be divided, and is divisible, when the thing which is the matter and object of it is susceptible of division and parts, by which it may be paid ; and on the contrary, an obligation is indivisible, and cannot be divided, when the thing is not susceptible of division and parts, and can only be paid altogether.

The division in question is not a physical division, which consists in *solutione continuitatis*, such as that of a plank, which may be divided in two, but a civil division.

There are two kinds of civil division, the one consisting in real and divided parts, the other intellectual, and undivided parts. When an acre of ground is divided into two parts by placing a fence in the middle, this is a division of the first kind : the parts of the acre, which are separated by this fence, are real and divided parts.

When a man who was proprietor of this acre of ground, or of any thing else, dies, and leaves two heirs, who continue proprietors of it, each having an undivided moiety, it is a division of the second kind ; the parts which result from this division, and which belong to each of the heirs, are undivided parts, which are not real, and which subsist only *in jure et intellectu*.

Things which are not susceptible of the first kind of division, may be so of the second. For instance, a horse, a watch, are not susceptible of the first kind of division ; for these things are not susceptible of real and divided parts, without the destruction of their substance ; but they are susceptible of the second kind of division, because they may belong to several persons, in undivided parts.

If a thing may be susceptible of this kind of division, although it be not susceptible of the first ; it is sufficient to make the obligation of giving the thing a divisible obligation. This results from law 9. § 1. *ff. de Solut.* where it is said, *qui Stichum debet, parte Stichi data, in reliquam partem tenetur*. According to this text, the obligation of giving the slave *Stichus* is divisible, since it may, at least by the consent of the creditor, be discharged in part, though the slave be not susceptible of the first division. *Dumoulin, ibid. p. 1. n. 5. p. 2. n. 200 & 201.*

Things

Things are indivisible, when they are neither susceptible of real nor even of intellectual parts; such are for the most part, the rights of prædial servitudes (a), *quæ pro parte acquiri non possunt*.

The obligation of giving a thing of this nature is indivisible. *Dumoulin, p. 2. 201.*

[289] The same rule which we have just laid down for judging whether obligations *in dando* are divisible or indivisible, will serve also with regard to obligations *in faciendo vel in non faciendo*. Many doctors have supposed that these obligations were indivisible, indiscriminately, but *Dumoulin, ib. p. 2. n. 203. & seq.* has demonstrated that they are not less divisible than the obligations *in dando*, at least if the fact, which is the object of it, is not of such a nature that it cannot be acquitted for a part, as when I am obliged to build a house, &c. But if the fact, which is the object of the obligation, can be acquitted in parts, as if I am under an obligation to put you in possession of a thing which may be possessed in parts, the obligation will be divisible: this is the fifth of the clefs of *Dumoulin, omnis obligatio etiam facti dividua est, nisi quatenus de contrario apparet. Dumoulin, ibid. & p. 3. n. 112.*

In like manner, an obligation *in non faciendo* will be divisible, when what I have obliged myself to do, may be done as to one part, and not as to the other; such is the obligation *amplius non agi ad aliquid dividuum*; as when I am engaged in your favour not to disturb the possessor of an estate which you are bound to warrant: this is an obligation *in non faciendo*, which is divisible; for it may be satisfied in part. I may contravene it as to part, by claiming one part only of this estate, and satisfy it in part by abstaining from claiming the other part.

[290] Observe, that it is the thing or act itself which constitutes the object of the obligation, that ought to be considered, in order to decide whether the obligation be divisible or indivisible, and not the utility which results to the creditor from the obligation contracted in his favour, nor the detriment, *onus et diminutio patrimonii*, which results from it to the debtor, otherwise every obligation would be divisible: therefore, for instance, if two proprietors of a house are obliged in favour of two proprietors of the next house, to subject their house to a servitude in his favour, this obligation is indivisible, because the right of servitude, which is the object of it, is indivisible, although the utility which results from it to each of them in whose favour it is contracted, and the detriment suffered by those who have contracted it, is to be estimated by a sum of money which is divisible. This is what is laid down by *Dumoulin, ibid. p. 2. n. 199. cum hic effectus sit quid re-*

(a) Rights of Way and other easements.

[294] This is a third kind of indivisibility, which is called *individuum solutione tantum*.

It is that which only concerns the payment of the obligation, and not the obligation itself, when the thing due is in itself divisible, and susceptible of parts, and may be due in parts, whether to the different heirs of the creditor, or by the different heirs of the debtor, but cannot be paid in parts.

We shall adduce several examples of this kind of indivisibility in the following article, in which we shall treat of the nature and effects of divisible obligations, according to the class to which the obligations properly belong, in which this kind of indivisibility occurs, since it does not concern the obligation itself, although nevertheless the law (a), 2. §. 1. ff. *de verb. Obligationum* regards it as a third and middle kind, between obligations divisible and indivisible.

§ III. *Several particular Kinds of Obligations, with regard to which it may be a Question, whether they are Divisible or Indivisible.*

Of the Obligation to deliver a piece of Land.

[295] The obligation to deliver a piece of land, *fundum tradi*, is a divisible obligation; for this delivery may be made in parts; a part of the land may be delivered: the act which forms the object of the obligation being therefore a divisible act, it cannot be doubted, according to the principles which we have established, but that this obligation is divisible; our decision is confirmed by the texts of law; for although the obligation of a borrower is the obligation of returning a specific thing, *obligatio rem tradi*, nevertheless the law 3. § 3. ff. *Commod.* decides that the heirs are regularly bound for the part only of which they are heirs, which is the character of divisible obligations; *heredes ejus qui commodatum accepit, pro ea parte qua heres est convenitur*. It is true, that this obligation of the borrower, although divisible, *quoad obligationem*, is indivisible at least, *quoad solutionem*, but we may easily state examples of obligations *tradi rem, tradi fundum*, which are divisible even *quoad solutionem*; such is that which *Dumoulin* gives,

(a) Stipulationum quædam in dando, quædam in faciendo consistunt. Et harum omnium quædam partium præstationem recipiunt; veluti, cum decem dari stipulamur: quædam non recipiunt, ut in his, quæ naturâ divisionem non admittunt; veluti, cum viam, iter, æctum stipulamur; quædam partis quidem dationem natura recipiunt, sed nisi tota dantur, stipulationi satis non fit; veluti cum hominem generaliter stipulor, aut lancem, aut quodlibet vas: nam si Stichus pars soluta sit, nondum in ulla parte stipulationis liberatio nata est, sed aut statim repeti potest, aut in pendentem est, donec alius detur: Ejusdem conditionis est hæc stipulatio, Stichum aut Pamphilum dari.

p. 2. n. 305. I make a compromise with my opponent respecting the claim of an estate which he demands from me, and I oblige myself by this compromise to leave the estate to him at my death, without any warranty on my part; this obligation, which is an obligation *fundum tradi*, is divisible, even *quoad solutionem*: and if I die, leaving four heirs, each of them acquits himself of this obligation, by renouncing the estate as to the part to which he has succeeded.

The law 72. ff. *de verb. Obl.* (a) appears, nevertheless, diametrically contrary to our decision: for the obligation, *fundum tradi*, is there adduced in formal terms, as an example of an indivisible obligation, with the obligations *fossam fodiri, insulam fabricari, vel siquid simile*, which are indivisible, *tam obligatione, quam solutione*. *Dimoulin* p. 2. n. 278. *ad. n. 359*, (a) after having adduced seventeen different opinions of doctors to reconcile this law, states his own, to which we must accede; he thinks, and justly, that this example of the obligation *fundum tradi*, ought not to be understood indiscriminately of every obligation, by which a person obliges himself to deliver a piece of ground, but only of the obligation by which a person is obliged to deliver a piece of ground, with circumstances which render the obligation of it indivisible; as for instance, if I wish to build a house, and have not a place to lay the materials necessary for that purpose, I agree with my neighbour, that he shall give me the use of a piece of ground near the scite of my intended house; this is an obligation *fundum tradi, non simpliciter, sed ad certum usum finemque principaliter consideratum in contrahendo*. And this purpose renders this obligation *fundum tradi*, indivisible: for an obligation is indivisible, when the matter that constitutes the object of it, is not susceptible of a partial performance, *cum id jus quod in obligationem deductum est, non nisi in solidum præstari potest*, which occurs in the instance proposed: for as this piece of ground ought to be furnished to me for the purpose of laying my materials, it can only be so furnished by my having it entire, since a part, which would not be large enough for laying my materials, could not serve the purpose for which it ought to be given me.

Of the Obligation of a Day's Work.

[296] The obligation of a day's work is indivisible, in the same manner as the obligation of building a house; for

(a) Stipulationes non dividuntur earum rerum, quæ divisionem non recipiunt; veluti viæ, itineris, actus, aquæductus, cæterorumque servitutium. Idem puto. et si quis faciendum aliquid stipulatus sit: ut puta, *fundum tradi, vel fossam fodiri, vel insulam fabricari, vel operari, vel quid his simile*; horum enim divisio corrumpit stipulationem.

though the service of a day's work is not in itself indivisible, nevertheless the obligation is contracted as if it were so, and cannot be acquitted in part; therefore *Ulpian* says, *nec promitti, nec solvi, nec deberi, nec peti pro parte poterit opera. l. 15. ff. de Oper. Libert.*

In like manner, *Pomponius*, in the law 3. § 1. *ff. de Oper. Libert.* decides, that the service of a day's work cannot be acquitted in part, by the performance of a certain number of hours, and that, consequently, the debtor of a day's work, who has worked till noon, and gone away, has not in any degree acquitted his obligation, and remains debtor of the day's work; *non pars operæ per horas solvi potest, quia id est officii diurni, neque ei liberto, qui sex horis duntaxat meridianis præsto fuisset, liberatio ejus diei contigit*; but after he has acquitted the day's works, of which he remained the debtor, he may demand the price of his half day's work, which he did not owe.

For the rest, *Dumoulin* very properly remarks, p. 2. n. 355. *et seq.* that this indivisibility of the obligation of a day's work, is only an indivisibility *obligatione*, and not an absolute indivisibility, or indivisibility *contractu*: for there is nothing to hinder a person from contracting the obligation of part of a day's work; it is true, that the law 15. § 1. *de Oper. Libert.* says, *nec promitti pro parte opera potest*. But this is a pure subtilty; the jurist takes *opera* for *officium diurnum*, according to the definition of the law 1. *ff. d. Tit* and according to this idea, regards it as indivisible, because if you divide it, it is no longer *officium diurnum*, but *officium horarium*.

Of the Obligation of doing a Piece of Work.

[297] We understand here, by work, *affectio transiens in opus specificum permanens*, according to the expression of *Dumoulin*, p. 2. n. 361, and we have already seen, n. 192, that the obligation of doing a work taken in this sense, such as the obligation of building a house, making a statue, or a picture, was an indivisible obligation, not of that absolute indivisibility which we have called, with *Dumoulin*, indivisibility *contractu*, but of the mere indivisibility *obligatione*.

Of the Obligation of giving a certain Sum, left by Will, for the building of an Hospital, or some other Purpose.

[298] The obligation which results from such a legacy is divisible, since it is the obligation of giving a sum of money; the adding in the will, to build an hospital, only expresses the motive of the testator, which induced him to give this legacy; it

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it is *ratio legandi*; but this motive not being attached to the disposition, *ratio legandi non coheret legato*. l. 72. § 6. ff. de Cond. et Dem. consequently cannot have any influence upon the nature of the legacy, or upon the obligation which results from it.

But if the testator had charged his heirs to build an hospital in a certain town, and to employ therein a certain sum of money, the obligation (the object of which would be the building of the hospital,) would be indivisible; it is to this last case that the law 11. § 23. (a) ff. de Leg. 3. should be applied.

A R T I C L E II.

Of the Nature and Effects of Divisible Obligations.

§ I. *General Principles.*

[299] An obligation is called divisible, as we have already observed, not because it is actually divided, but because it is capable of being divided; therefore, however divisible the thing due may be, the obligation, before it has been divided, is undivided, and cannot be acquitted in parts, as we shall see *infra*, P. III. ch. 1. Art. III. §. 2.

Care must therefore be taken, not to confound indivision with indivisibility: this is the first of the clefs of *Dumoulin, Tr. de Div. et Individ. p. 3. n. 7. et seq. n. 112.*

This division of obligations is made, either on the part of the debtor, or on that of the creditor, or sometimes of both the obligation is divided on the part of the creditor, when he leaves several heirs; each of the heirs is creditor for his own part only; whence it follows, that he can only enforce this claim as to that part: that he can only give a discharge for this part; at least, unless he has a procuration from his co-heirs to receive theirs; and it follows in like manner, that the debtor may pay separately, to each of the heirs, the portion which is due to him.

The obligation is divided in like manner on the part of the debtor, when he leaves several heirs; each of the heirs is only bound for his part of the debt, and, in general, each of them may oblige the creditor to receive such part.

(a) Si in opere civitatis faciendo aliquid relictum sit, unumquemque heredem in solidum teneri. D. Marcus, et Lucius Verus, Proculus rescripserunt.

§ II. *Modification of the first Effect of the Division of an Obligation, on the Part of the Debtor.*

[300] The principle which we have established, that in divisible obligations each heir of the debtor is only liable in respect of the part of the debt, for which he is heir, is subject to several exceptions and modifications.

The first is with regard to hypothecatory debts; in this case, when the heirs of the debtor are possessors of the property hypothecated for the debt, although the debt is divided among them, and consequently they are only subject to a personal action, for the part of which they are respectively heirs, they may be pursued hypothecatorily for the whole of this debt, as possessors of the goods hypothecated.

[301] The second is with regard to debts of a specific thing, which the deceased has left in his succession: when the deceased has left heirs of different kinds, some for his moveables and acquisitions, others for his patrimonial effects, they are not all subject to the debt of this specific thing, but the heirs of that portion of the property, of which it constitutes a part, are alone liable for it; the reason is, that the deceased could not be liable himself if he were still alive, except inasmuch as he still possessed it, or had ceased to do so by his own act or default. The heirs of the portion of which the thing does not constitute a part, who consequently have never either possessed it, or ceased to possess it, cannot then be liable for the debt, as they can only be liable in the same manner as the deceased, whom they represent, would be; it is only the heirs then of the portion of which the thing constitutes a part, who can be liable for it.

But if in the division among the heirs of this portion, the thing due by the deceased has been comprised in the lot of one of them, the others are not therefore discharged from the debt, even although they may have charged the one to whose lot the thing has fallen, with discharging the debt when it should become due: for, having been once liable for this debt, they could not, by their own act, in allotting the thing due, discharge themselves from the obligation of delivering it to the creditor.

[302] The third modification also relates to debts of a specific thing: although the debt of a divisible specific thing is divided among the heirs of the debtor, who succeed to that branch of the property, of which it constitutes a part, and even after the division by which the thing is allotted to one of them, each
of

of the heirs continues to be debtor for his part of it, as we have just seen; nevertheless, he to whose lot it falls, may be pursued for the payment of the whole to the creditor, provided his co-heirs are included in the judgment, if he has not been charged with this debt by the division.

The reason that *Dumoulin* gives for this is, that although the action arising from this debt be divided against each of the heirs of the debtor, nevertheless, as the execution is to be levied for the whole upon him, who by the division is become the sole possessor of it, it follows that he may be condemned to the entire delivery of it; "*quia quamvis actio mere sit personalis, tamen executio judicati in rem scripta est, et divisio non debet impedire vim futuri judicii, nec executionem in rem et in ejus possessorem, salvo contra heredes recurſu.*" *Dumoulin*, p. 2. n. 48.

This decision takes place when it is in his quality of heir, and by reason of the partition of the succession that he has the entire possession of the thing which is due; it would be otherwise if he possessed it in his own right. In this case he would only be debtor, and could only be compelled to pay in respect of the part for which he was heir. This may be inferred from the law 86. § 3. ff. *de Leg. 1. Si fundus ab omnibus heredibus legatus sit, qui unius heredis esset, is, cujus fundus esset, non amplius quam partem suam præstabit, ceteri in reliquas partes tenebuntur.*

We have seen, that when the heir on the part of the debtor of a specific thing, is, in his quality of heir, possessor of the whole of that thing, he may be condemned to the entire delivery of it, provided his co-heirs are included in the judgment, according to what *Dumoulin* says, *ibid.* n. 84. This author goes further, n. p. 3. n. 242. *ibid.* for he decides, that the heir may be condemned, even when the co-heirs have not been made parties, when it is evident that they could not have any means of defence; if a person has sold a thing to be delivered in a month, and having received the price, dies within the time, leaving several heirs, he decides that the sale and payment of the price being evident, the heir, in whose possession the thing is, may after the expiration of the term be condemned to deliver it, without having a right to require that his co-heirs be included in the cause.

[303] The fourth modification, is when a debt consists in the simple restitution of a thing, of which the creditor is proprietor, and of which the debtor had only the mere detention, although the thing be divisible, and consequently the debt be so likewise; nevertheless, the particular heir of the debtor, who is in possession, is liable to the restitution of the whole. For instance, if any one has lent you, or given into your care a library, although

this debt is divisible, such of your heirs as may have the possession of the library will be liable to the restitution of the whole of it: *Heres ejus qui commodatum accepit, pro ea parte qua heres est, convenitur, nisi forte habuit totius rei facultatem restituendæ, nec faciat: tunc enim condemnatur in solidum, quia hoc boni judicis arbitrio conveniat. l. 3. § 5. Commod.*

The reason is, that the heir, who has the entire possession of the thing, having it in his power to restore it, and not having any occasion to wait for the consent of his co-heirs, who have no right in the thing, and to whom the restitution will be advantageous, by discharging them from the obligation which they themselves are under, good faith does not allow him to refuse this restitution; this is what the jurist intimates by the terms, *quia hoc boni judicis arbitrio conveniat*. If this heir is only bound for his hereditary part, *ex prima et primitiva obligatione depositi aut commodati quæ dividua est*, he is bound for the whole restitution which is in his power, *ex obligatione accessoria præstandi bonam fidem*, the obligation of good faith being indivisible, *neque enim bona fides potest præstari pro parte*. This is also one of the clefs of *Dumoulin, lex Duodecim Tabularum*, says he, *non dividit obligationes etiam dividuas, quatenus respiciunt bonam fidem; unde obligatio etiam dividua ad officium bonæ fidei obligat, in solidum concurrente facultate præstandi, et quatenus concurrat, et quando cumque hoc contigerit. Dumoulin, p. 3. n. 112.*

[304] A fifth modification is, that any one of the heirs, by whose act or fault the thing has perished, is liable for the whole of the debt: the reason is deduced from the principle of *Dumoulin*, that the principal obligation, *rem dividuam dandi*, is indeed divisible; but the accessory obligation, *præstandi fidem bonam et diligentiam*, which is joined to it, is indivisible: each of the heirs is in this respect bound *in solidum, nec enim pro parte diligentia præstari potest*; whence it follows, that the heir, by whose act or fault the thing is lost, is answerable for the whole. According to these principles, if a person obliges himself in my favour to let me enjoy an estate, either by way of lease, or by sale of an usufruct, and leaves four heirs; if one of the heirs, without any right of his own, unjustly molests me in the enjoyment of the whole of this estate, he will be liable for the whole of my damages, and not for that part alone of which he is heir; for though the principal obligation, of giving me the enjoyment be divisible, the accessory obligation, *præstandi bonam fidem*, which includes the obligation of not giving me any molestation, is indivisible; and consequently passes to each of the heirs for the whole; and the heir who contravenes it, ought to be liable for the whole of the damages arising therefrom.

Hence

Hence this maxim, that an heir can indeed only be proceeded against for a divisible debt, as to that part only for which he is heir, where he is pursued merely in his quality of heir, and for the act of the deceased, but that he may be proceeded against for the whole on account of his own personal act: "*Multum refert unum heredem debitoris teneri secundariâ obligatione ut heredem tantum, id est ex facto vel non facto defuncti tantum; an vero ut ipsum id est, ex suo facto proprio vel non facto.*" *Dumoulin*, p. 3. n. 5.

[305] With regard to the other heirs, who have not concurred, by any act or fault on their part, to the loss of the thing due, they are liberated; for this heir is liable for the debt just as the deceased was; the deceased would have been liberated by the loss of the thing happening without his fault; the heir ought in like manner to be liberated by the loss happening without the fault, either of the deceased or of himself. The heir is liable for the acts of the deceased, since he succeeds to his obligations, but he is not liable for the act of his co-heirs: this is decided by the laws 9 & 10. ff. *Depos.* *In depositi actiones si de facto defuncti agatur, adversus unum ex pluribus heredibus, pro parte non ago; merito quia estimatio refertur ad dolum quem in solidum ipse admisit, nec adversus coheredes qui dolo carent actio competit.* *Paulus* decides the same with respect of things lent for use. l. 17. (a) § 2. ff. *Commod.* *Dumoulin*, p. 3. n. 439 & 440.

If a penalty were stipulated in case the thing should not be restored, in this case, though it has perished by the fault of one of them, and without the act or fault of the others, they will still be liable for the penalty, each for his respective part; for the obligation of paying the sum agreed upon as a penalty, is a second obligation, which the deceased has contracted, which is conditional, upon the non-performance of the first; the heirs of the deceased have each, in respect of the part for which they are heirs, succeeded to this second obligation upon the same condition: they are then liable, each for his hereditary part, to pay this sum in case the condition exists, that is to say, in case the first obligation should not be executed, whether by the act or fault of the deceased, or by that of any of his heirs, saving their recourse against their co-heir, by whose act the thing has perished. This is what is meant by *Dumoulin*, when he says, that the co-heirs of him by whose act the thing perished, are liable in this case to the penalty: *non immediate ex facto & culpa dolosa, sed ejus occasione, et tanquam ex eventu conditionis, ex obligatione defuncti quæ in eos sub eâ conditione descendit.* *Dumoulin*, d. n. 440.

(a) Si ex facto heredis agatur commodati, in solidum condemnatur, licet ex parte heres est.

It is this case which is meant by *Paulus* in law 44. § 5. *ff. Fam. Erc.* where he says, *Si reliqui propter factum unius teneri ceperint, tanquam conditio stipulationis hereditariae extiterit, habebunt familie erciscunda judicium cum eo, propter quem commissa sit stipulatio.*

Observe, that to make the contravention of one of the heirs fall upon his co-heirs, there must have been a second express agreement, by which the deceased obliges himself to pay a penalty, in case of the non-performance of the principal obligation, or by which he obliges himself to damages in case of contravention by him or his heirs; but it is not sufficient for this purpose, that it be said at the end of the act, that all the parties oblige themselves to the contents of the act, on pain of all the expences and damages; for this clause does not contain a second obligation: *Hæc clausula nihil novi addit, cum sit ex stylo communi ad confirmandum tantum, secundum materiam subjectam et ejus limites. ibid. 442.*

It may probably be urged in opposition to the distinction of *Dumoulin*, that in all agreements which contain a principal obligation, a second tacit agreement, accessory to the first, should always be understood, by which the debtor engages himself for damages, in case of a contravention to the principal obligation by him or his heirs, and that this second tacit agreement ought to have the same effect, as if it were express. The answer is, that it is false, that this second obligation should be understood where it is not expressed; if the debtor who contravenes his principal obligation is liable to the damages resulting from his contravention, it is not by virtue of any second supposed agreement, by which he has obliged himself for these damages; it is only because this obligation of damages is included in the principal obligation, and that this principal obligation, *ex propria natura*, is converted against the contravening party into an obligation of damages; but in this case, when it is one of the heirs who contravenes the obligation, the other heirs who have not contravened it, are not liable for any damages; these heirs being liable for the acts of the deceased whom they represent, and for their own acts, but not for the acts of their co-heir, as has already been observed.

[306] When the thing has perished by the fault, or fraud of several of the heirs, each of them is bound in solido; *nec enim*, says *Dumoulin*, *qui peccavit, ex eo relevari debet, quod peccati habet consortem.*

If, however, these heirs had, each by a particular act, lost different parts of the thing due, each would only be liable for the loss of that part: for in this case, *unusquisque non in solidum, sed in parte, duntaxat, dolum admisit*; this is what *Marcellus* decides in law 22. *ff. Depos.* *Si duo heredes rem apud defunctum depositam dolo inter-*
venerint,

venerint, quodam casu in partes duntaxat tenebuntur ; nam si dividerunt decem millia, quæ apud defunctum fuerant, et quina millia singuli abstulerint, et uterque solvendo est : in partes adstricti erunt, quod si quæ species dolo eorum interversa fuerit, in solidum conveniri poterunt, nam certe verum est in solidum quemque dolo fecisse.

Observe, with regard to the first case of the above law that it is said, *si uterque in solvendo est* ; for if one of the two heirs were insolvent, the one who was solvent would have been in fault, not only with respect of his own moiety, but even with respect of the other, as he ought not to have divided the sum deposited with the deceased with his insolvent co-heir. If the obligation of restoring the sum were a divisible obligation, the accessory obligation to keep and preserve it with good faith, to which each of them was bound for the whole, and which he has contravened, not only with respect of the moiety which he ought to pay, but also with respect of the other moiety, which he has left at the mercy of his insolvent co-heir was indivisible.

[307] A sixth exception is, that although an obligation be divisible, one of the heirs of the debtor may be liable for the whole of it, either by an agreement, or by the will of the deceased, charging him with it, or by the act of the judge who has made the division of the goods of the succession ; in all these cases, one of the heirs is bound for the whole of the debt, without the others ceasing to be bound for their respective parts.

[308] It results from all these modifications, that *aliud est unum ex pluribus sive principalibus sive heredibus teneri in solidum, aliud obligationem esse individuum* ; this is the third of the clefs of *Dumoulin*, p. 3. n. 112.

[309] Except in these cases, each of the heirs of the debtor is only subject to divisible debts, in respect of the part of which he is heir ; and is not even bound subsidiarily for the surplus in case of the insolvency of his co-heirs ; the law 2. *Cod. de Hered. Act.* (a) which decides, that each heir is only subject to the debts of the deceased on his own part, does not distinguish whether all the heirs are solvent or not. This follows from the very idea of an heir : an heir is one who succeeds to the active and passive rights, that is to say, to the debts and obligations of the deceased ; he who is only heir in part, only succeeds to that part, he is therefore only liable to that part, the insolvency of his co-heirs does not make him succeed to all the rights of the deceased ; he is only successor for his part, and consequently ought only to be liable for his part of the debts.

(a) Pro hereditariis partibus heredes onera hereditaria agnoscere etiam in fidei rationibus placuit ; nisi intercedat pignus, vel hypotheca, tunc enim possessor obligatus rei conveniendus est.

It is said, in opposition to this, that the debts being a charge upon the effects, they should be discharged in full out of the goods, which are retained by this heir as his part. The answer is, that the total universality of the goods is charged with the whole of the debts, but the portions of this universality, are only charged with a like portion of the debts. It is asserted, that if the debtor had dissipated the half of his goods, the remaining half would be charged with the whole of his debts; then, when one of the heirs of the debtor has dissipated his moiety, the other moiety, which belongs to the other heir, ought in like manner to be charged with the whole of the debts: I deny the consequence. When the debtor has dissipated the moiety of his goods, what remains is the whole of the goods of the person obliged for the whole of the debt, and consequently, the whole of the debts is a charge upon the remaining part of the goods. But when my co-heir has dissipated the moiety which devolves upon him, that which I have is only my own hereditary portion; this portion therefore ought only to be charged with a moiety of the debts. It is further insisted, that the creditor ought not to suffer from the multiplicity of heirs which the debtor leaves; therefore the dissipation of the moiety of these goods by one of the heirs of the debtor, ought not to make him lose the moiety of his debt; since if the debtor, or the single heir of the debtor, had lost this moiety of the goods, the creditor would lose no part of his debt: the answer is, that it is only *ex accidenti* that the creditor suffers in this case, from the multiplicity of heirs which the debtor has left; he might have avoided suffering any thing, by attaching the goods of the succession before the division took place, or by a proper vigilance to obtain payment.

This decision, that the heir in part is not bound for the debts of the portions of his co-heirs, who are become insolvent, even although his portion would be more than sufficient to pay the whole, being deduced from the principles of natural reason, and from the very nature and quality of heir, it ought to prevail in point of conscience, as well as in point of law.

[310] This principle, that an heir is not answerable for the insolvency of his co-heir, is subject to several exceptions. The first, which does not admit of any difficulty, is, when by the fraud and act of one heir, the creditor has not been able to obtain payment from the other heirs who are become insolvent; as for instance, if he had represented himself as the only heir. *Dumoulin, ibid. n. 85. in Fin.*

Dumoulin adduces, as a second exception, the case of a father's leaving two children as his heirs, one of whom had before-hand dissipated

dissipated what he would have received from the succession, and for which he is accountable in the distribution, so that he would, on his part, receive a much smaller portion of the goods left by the father, than the portion of the debts for which he is liable as heir. The other child ought to be answerable in this case to the creditors of the succession for that part of the debts belonging to his insolvent brother, although the creditors have not had the precaution to attach the goods of the succession before the distribution; the reason is, that this child having taken almost all the goods left by the deceased, by reason that his brother was obliged to account for what he had received in the life of their common father, it is just that he should not, at the expence of the creditors of the succession, profit on account of his brother having improperly taken upon himself the character of heir. There is reason in this case to presume that there was a collusion between the two brothers, and that the solvent brother induced the other to act as heir: with the view of eluding a part of his debts, and defrauding his creditors, *Hoc est injustum*, says Dumoulin, *nec suspitione collusionis vacat. ibid. n. 93. in Fin.*

This author, n. 92. adduces, as a third exception, the case in which the creditor has made a loan to the deceased, which has been the cause of making his fortune; in this case as the solvent heir, is in some measure indebted to the creditor for the part which he receives in an opulent succession, he ought not to let the creditor lose the part of the debt for which his insolvent co-heir is bound; this decision of *Dumoulin* is attended with some difficulty; I allow that gratitude demands such conduct; but gratitude only induces imperfect obligations, which are not obligatory in point of law.

§ III. *Of the second Effect of the Division of a Debt, which consists in its being capable of payment in Parts.*

[311] We have seen that the effects of the division of the debt, whether on the part of the creditor, or on that of the debtor, is that the payment may be made by parts: to wit, the parts due to each of the heirs of the creditor, and by each of the heirs of the debtor; this principle has likewise its exceptions and modifications, *non propter individuitatem obligationis, sed propter incongruitatem solutionis*, says *Dumoulin*, that is to say, not because the partial payment of a divisible obligation be not always possible, absolutely speaking, for since the thing due has parts, it is a necessary consequence that it may be paid by parts; but if it sometimes happens that the payment of these obligations ought not to be made by parts, it is because a partial payment

payment is not always equitable; *aliud quippe individuitas obligationis, aliud incongruitas solutionis*, this is the fourth of the clefts of *Dumoulin*, p. 3. n. 112.

[312] The first case in which the partial payment of a debt is not valid, although the debt is divisible, is that of alternative debts, or debts of indeterminate things; for instance, if a person who is debtor of such a house, or of ten thousand pounds, leave two heirs, one of them will not be admitted to pay the half of one of these things, until the other likewise pays the remaining half of the same thing; for if after one has paid the half of the house, the other chooses to pay the half of the money, a prejudice would result to the creditor, who ought to receive one of the two entire things, and not two halves of two different things. For this reason, even if the creditor had voluntarily received the moiety of one of the two things, as the moiety of the money, the payment would not be perfect, even as to such moiety, until the other had paid the other moiety; and if in the sequel they gave him the house, a right would arise to the repetition of the money. *Infra*, p. 3. n. 525.

So in case of debts of indeterminate things; if the deceased owed an acre of ground indeterminately, one of his heirs is not entitled to offer to the creditor the moiety of a certain acre until the other heir gives also in payment the other moiety of the same acre; otherwise a prejudice would result to the creditor, to whom an entire acre is owing, and who has an interest in having an entire acre, rather than the moiety of two different acres: this appears by law (a) 85, § 4. and law (b) 2. § ff. *de verb. Oblig.* *Dumoulin*, p. 2. n. 125.

This indivisibility of payment ought to prevail, not only when a debt has been divided on the part of the debtor, but also in like manner, when it has been divided on the part of the creditor, who has left several heirs; for it is the interest of these heirs of the creditor to receive one whole thing which is due to them, and which is only in common between themselves, rather than portions of different things which they would have in common with strangers. *Dumoulin*, *ib.* p. 2. n. 130.

(a) Pro parte (autem) peti, solvi autem nisi totum non potest; veluti cum stipulatus sum hominem incertum, non petitio ejus scinditur; solvi vero nisi solidus non potest; alioquin in diversis hominibus recte partes solventur; quod non potuit defunctus facere, ne, quod stipulatus sum, consequar. Idem juris est, et si quis decem millia aut hominem, promiserit.

(b) For the first part of this law, *vide supra*, n. 294. § 2. Ex his igitur stipulationibus ne heredes quidem pro parte solvendo liberari possunt, quamdiu non eandem rem omnes dederint: non enim ex persona heredum conditio obligationis immutatur.

When

When one of the heirs of the debtor has been liberated from his part of the debt, either by the release of the creditor, or otherwise, then there is nothing to prevent the other heir from paying the moiety he owes, of which-ever of the things he chooses, *d. l. 2. § 3. (a)* The reason which prevents the partial payment ceases; for there is no longer any reason to fear that the payment will be made in portions of different things.

Observe, that in the text cited, after these words, *si tamen hominem stipulatus, cum uno ex heredibus egero*, we must add by implication, *et victus fuero per judicium judicis*. *V. Cujas, ad L. Dumoulin, ibid. p. 2. n. 188.*

Observe also, that the non-division in the payment of an alternative debt ceases, when this debt, by the extinction of one of the things, ceases to be alternative, and becomes determinate in regard to the thing which remains; in this case there is no reason why the thing may not be paid by parts, either by the different heirs of the debtor, or to the different heirs of the creditor.

[313] The second case in which the payment of an obligation, although divisible, and divided among several heirs of the debtor, cannot be made by parts, is when it is so agreed in contracting the obligation, or afterwards: however, the validity of such an agreement may be doubted; because the law 56. § 1. *de verb. Oblig.* decides, that a person cannot by his contract oblige one of his heirs for the payment of a greater part of the debt than his proportion as heir; “*Te et Titium heredem tuum decem daturum spondes. Titii persona supervacua comprehensa est; siue enim solus heres extiterit, in solidum tenebitur; siue pro parte, eodem modo quo ceteri coheredes ejus,*” that is to say, that he will be bound, notwithstanding this clause of the stipulation for that part only, of which he shall be heir; and the reason is, that being heir of the contracting party only for this part, and consequently a stranger with regard to the other parts, he could not be obliged for the others; according to the principle of law, that *nemo nisi de se promittere potest, non de extraneo*.

Notwithstanding this, *Dumoulin* decides, and rightly, that one may effectually agree that a debt shall not be capable of being acquitted by parts, by the different heirs of the debtor, and he remarks very justly, that this agreement is very different from the case of the law above cited, which relates to the substance of the obligation itself; whereas this agreement only concerns the man-

(a) Si tamen hominem stipulatus, cum uno ex heredibus promissoris egero, pars duntaxat ceterorum obligationi supererit, ut et solvi potest. Idemque est si uni ex heredibus accepto latum sit.

ner in which the payment is to be made, *non concernit substantiam obligationis sed modum : unde quemadmodum potest in præjudicium heredum determinari locus et tempus solutionis, ita et modus.* Dumoulin, *ibid.* p. 2. n. 30 & 31. The effect of this agreement is, not that one of the heirs will be bound for more than his own part, but that he can only make the payment of the entire thing, conjointly with his co-heirs, so that any offer from him to give his part would not be sufficient to satisfy even his part of the obligation, if his co-heirs did not likewise offer theirs. *Infra, vide n. 316.*

[314] This agreement, that the debt cannot be paid by parts, is sufficient to prevent the heirs of the debtor from being intitled to pay it in parts ; but it does not prevent its being paid in parts to the different heirs of the creditor.

The debtor cannot even make a valid payment to any one of them, except for his own part ; and if he paid the whole to one, he would not be liberated as to the others.

Nevertheless, it may also be agreed, that one of the heirs of the creditor may demand the whole, and that the whole may be paid to him ; in which case, a payment to him, liberates the debtor against all the others ; the one who has received the payment, is regarded as a person appointed on their behalf, or as *adjectus solutionis gratia.* Dumoulin, *ibid.* n. 33.

[315] The third case, in which the debt, although divided among the heirs of the debtor, is not to be acquitted by parts, is when, without any agreement having taken place, it appears from the nature of the engagement, or of the thing which is the object of it, or from the end which is proposed in the contract, that the intention of the contracting parties really was, that the debt should not be acquitted by parts ; this may be easily presumed, when the thing which is the object of the agreement is susceptible indeed of intellectual parts, and is consequently divisible, but cannot be divided into real parts. Dumoulin, p. 3. n. 223.

It may be presumed, with respect to things which may be divided into real parts, but not without prejudice to the creditor.

For instance, if I have bought, or taken to farm, a certain estate, though this estate be susceptible of parts, yet one of the heirs of the person who sold or leased it to me, would not be entitled to offer me his part of this estate, divided or undivided, in discharge of his obligation, if his co-heirs were not also ready to deliver me theirs, because the division of this estate would be a prejudice to me. I only bought or took it in order to possess the whole of it,

it, or to enjoy it as the sole proprietor, and I should not have bought or taken a part of it only.

The end which the contracting parties proposed, may also prevent the partial payment, even of debts of a sum of money. For instance, if by a transaction you oblige yourself to pay me the sum of a thousand pounds, declaring that it is to liberate me from prison, where I was detained for the same sum by a creditor, and soon after you should die, leaving four heirs, one of these heirs will not be entitled to offer me separately the fourth of the said sum which cannot procure me the liberation of my person, which was the object of the contract, and which I might not be able to keep securely in prison, whilst I waited for the payment of the remainder. *Dumoulin, p. 2. n. 40.*

[316] In all the cases that have been adduced, in which an obligation, though in itself divisible, cannot be discharged in parts, the creditor cannot indeed put the heirs of the debtor *en demeure*, except by a demand against all; a demand against one of them, for the payment of the whole, would not be valid, and would not put him *en demeure*, since the obligation being divisible, he does not owe the whole. But although one of the heirs be not a debtor for more than the part of which he is heir, and cannot be sued for the whole; yet the non-division of payment prevents him from making a valid offer of the part of which he is debtor, if the remainder is not offered at the same time by his co-heirs. Therefore such partial offers, not only do not put the creditor *en demeure*, as to receiving the debt, or stop the course of interest, if the debt is of such a nature as to carry interest; but if the heir who made these offers had been previously put *en demeure*, by a demand given against all the heirs, these imperfect offers would not purge his delay, and would not prevent his being subject to all the consequences resulting of it, saving his recourse against his co-heirs. *Dumoulin, p. 2. n. 243.*

§ IV. *Of the Division of a Debt as well on the Part of the Creditor, as on that of the Debtor.*

[317] When the debt is divided as well on the part of the creditor as on that of the debtor; as, if the creditor has left four heirs, and the debtor has also left four; each of the heirs of the debtor, who, by the division is only bound for a fourth of the debt, may pay divisibly, and for the fourth only of which he is debtor, the

the fourth which is due to each of the heirs of the creditor, that is to say, that he may pay to each of them the fourth of the fourth, or a sixteenth of the whole.

¶ V. *Whether the Re-union of the Portions, either of the Heirs of the Creditor or of the Debtor, in a single Person, puts an end to the Power of paying the Debt by Parts.*

[318] The decision of this question depends upon the principle, that the division of the debt, which takes place by the death of the creditor, or of the debtor leaving several heirs, does not convert one debt into several, but only assigns to each of the heirs, whether of the creditor or of the debtor, certain portions of that debt which had no portions before, although it was susceptible of them; in this alone the division consists; there is still only one debt, *unum debitum*; as the law 9. *ff. de Pactis*, (a) lays down in formal terms. In fact, the different heirs of the creditor are only creditors of that which has been contracted in favour of the deceased: the different heirs of the debtor are only debtors for that which has been contracted by the deceased. Therefore there is only one debt; but, (and herein consists the division), this debt, which was undivided, and did not contain any portions, as long as there was only one debtor, and only one creditor, comes eventually to have portions, and to be due by portions, either to each of the heirs of the creditor, or by each of the heirs of the debtor.

From this principle arises the decision of the question; the portions of the debt in which the division consists, being produced by the multiplicity of persons to whom the debt is due, when the creditor has left several heirs, or by the multiplicity of persons by whom the debt is due; when the debtor has left several, it follows that when this multiplicity of persons ceases, there ceases to be any parts in the debt; *cessante causa, cessat effectus*: and consequently the division of the debt ceases, and the power of paying it in parts ceases also.

If then a debtor or a creditor has left several heirs, and the survivor of the heirs should be the only heir of all the others, the

(a) Si plures sint, qui eandem actionem habent, unius loco habentur. Ut puta, plures sunt rei stipulandi, vel plures argentarii, quorum nomina simul facta sunt, unius loco numerantur, quia unum debitum est. Et cum tutores pupilli creditoris plures convenissent, unius loco numerantur, quia unius pupilli nomine convenerant. Necnon et unus tutor plurium pupillorum nomine unum debitum prætendentium, si convenerit, placuit unius loco esse; nam difficile est, ut unus homo duorum vicem sustineat: nam nec is, qui plures actiones habet adversus eum, qui [unam] actionem habet, plurium personarum loco accipitur.

power of discharging the debt by parts, will cease ; because as there is no longer any more than a single creditor, or a single debtor of the debt, there are no longer any portions in the debt.

It is to no purpose to say, that the debtor having once acquired the right of paying by portions, when the creditor has left several heirs, he cannot afterwards lose it ; that the obligation which each of the heirs of the creditor was under, to receive his part separately, ought to pass to the survivor who has succeeded to all the obligations of those previously deceased ; for this would be true, if this power of paying by portions was intrinsic in the obligation, and was not, on the contrary, merely dependent on the extrinsic circumstance of the multiplicity of the persons, to whom, or by whom the debt is due, which circumstance ceasing, its effect should cease likewise. See *Dumoulin, p. 2. n. 18. et seq.*

This decision does not take place when the last survivor of several heirs of the debtor has taken the successions of those previously deceased, with the benefit of an inventory : for this benefit by preventing a confusion of the property of the succession with that of the heir, prevents likewise the re-union of the portions of the debt ; the survivor owes separately and differently, the portion of the debt for which he is bound on his own account, and that for which he is liable as heir of those previously deceased, since he is liable for the one out of his own property, and for the others only out of the goods arising from the succession ; now, being bound separately and differently for these different portions of the debt, it is a natural consequence, that he has a right to discharge them separately ; this is the opinion of *Dumoulin, p. 2. n. 22.*

[319] The re-union of the portions of the heirs of the creditor, in a single person, destroys the power of paying by portions, in whatever manner the re-union be made, not only when one of the heirs is become heir of all the others, but also when he has by cession acquired the rights of all the others.

Supposing there to be no cession, could one of the heirs who had only a procuration from all the others to demand the debt, or even a third person who had a procuration from them all, refuse to accept the payment of a portion ? It seems that he could not : for there is no re-union in this case ; there are in fact several persons to whom the debt is due for their respective portions, and consequently it seems that it may be paid by portions ; notwithstanding this reason, *Dumoulin, p. 2. n. 25.* decides, that this procurator of all the heirs may refuse to receive the payment of the debt by portions : the reason is, that as, when the debt is divided amongst the heirs of the debtor, such division is made for the interest of these heirs, so that they may each be liable to the debt, only in

respect of their hereditary portion, and may be liberated from it by paying this portion ; so when the debt is divided amongst the heirs of the creditor, the division is only made in this case in favour of, and for the interest of the heirs of the creditor, so that each of them may demand and receive his portion without waiting for his co-heirs : these co-heirs of the creditor then may waive using the right arising from this division of the debt, which is only made in their favour according to the maxim of law, that *unicuique liberum est juri in favorem suum introducto renunciare* ; and consequently the person who has the procuration of all the heirs, may refuse to receive the debt by portions.

[320] All that we have hitherto said holds good where the portions of several heirs of a single creditor or of a single debtor are united in the same person ; it must be decided otherwise when a debt has at first been contracted in favour of two creditors, or by two debtors without solidity, and for their respective portions ; in this case there are two debts truly distinct and separate, and they do not cease to be so, although one of the creditors or one of the debtors has succeeded to the other ; therefore the payment may still be made separately. *Dumoulin, ibid. n. 29.*

§ VI. *Difference between the Debt of several Specific Things, and that of several indeterminate Things, with respect to the Manner in which they are divided.*

[321] When the debt is of several specific and determinate things, as of such an acre of ground, and of such another acre, and comes to be divided, as by the death of a creditor who has left two heirs, the division is made *in partes, rerum singularum* : the debtor does not owe one of the two acres of ground to one of the heirs, and the other acre to the other ; but owes to each of the heirs the half both of the one acre and of the other, saving to these heirs the right of partition among themselves.

It is otherwise when the debt is of two indeterminate things ; as if, in the instance supposed, a debtor owed no acre in particular, but two acres indeterminately ; in this case he would owe to each of the heirs of the creditor one acre, and not the moiety of two acres : the division is not made *in partes, rerum singularum*, but numerically, *numero dividitur obligatio*. This is the decision of the laws 54. (a) *ff. de verb. Oblig. l. 29.* (b) *ff. de Solut.*

(a) In stipulationibus aliàs species, aliàs genera deducuntur. Cum species stipulamur, necesse est inter dominos et inter heredem ita dividi stipulationem ut partes corporum cuique debebuntur. Quotiens autem genera stipulamur, numero fit inter eos divisio : veluti cum Stichum et Pamphilum quis stipulatus, duos heredes æquis partibus reliquit : necesse est utrique partem dimidiam Stichi & Pamphili deberi. Si idem duos homines stipulatus fuisset : singuli homines heredibus ejus deberentur.

(b) Cum Stichus et Pamphilus communi servo promissi sunt, non alteri Stichus, alteri Pamphilus

A R T I C L E III.

Of the Nature and Effects of Indivisible Obligations.

§ I. *General Principles Concerning the Nature of Indivisible Obligations.*

[322] An indivisible obligation, being the obligation of a thing, or act, which is not susceptible of parts, either real or intellectual, it is a necessary consequence, that when two or more persons have contracted a debt of this kind, although they have not contracted it in solido, *et tanquam correi debendi*, nevertheless, each of the persons obliged is debtor for the whole of the thing, or act, that forms the object of the obligation ; for he cannot be debtor for a part of it only, since it is supposed that the thing is not susceptible of parts.

For the same reason, when the person who has contracted a debt of this kind has left several heirs, each of the heirs is debtor for the whole of the thing, as there can be no debtor by parts of a thing, which is not susceptible of them, *ea quæ in partes dividi non possunt, solida a singulis heredibus debentur. l. 192. ff. de Reg. Jur.*

So, when the creditor of such a debt has left several heirs, the thing is due by the whole to each of the heirs, as it could not be due in parts, not being susceptible of them.

[323] So, far indivisibility of obligation agrees with solidity ; but it differs from it principally in this, that in regard to indivisibility of obligation, each of the debtors is so for the whole, on account of the quality of the thing due, which is not susceptible of parts ; this indivisibility is a real quality of the obligation, which passes with this quality to the heirs, and makes each of the heirs of the debtor, debtor for the whole : the character of solidity, on the contrary, arises from the act of the persons who are each obliged for the whole, it is a personal quality, which does not prevent their obligation in solido, from being divided amongst the heirs of each of the debtors in solido, who have contracted it, and amongst the heirs of the creditor, in whose favour it has been contracted : this is what *Dumoulin* lays down, with his usual energy : *in correis credendi vel debendi qualitas distributiva seu multiplicativa so-*

Pamphilus solvi potest, sed dimidiæ singulorum partes debentur. Idemque est si quis aut duos Stichos aut duos Pamphilos dari promissit : aut communi duorum servo homines decem dare promissit. Nam ambigua vox est decem homines, quemadmodum decem denarii, atque utriusque rei dimidium duobus modis intelligi potest ; sed in nummis et oleo, ac frumento et similibus, quæ communi specie continentur, apparet hoc actum, ut numero dividatur obligatio : quatenus et commodius promissori stipulatoribusque est.

lidi, personalis est, et non transit in heredes nec ad heredes, inter quas activè vel passivè dividitur: sed qualitas solidi in individuis realis est quia non personis ut illa correorum, sed obligationi ipsi et rei debite adhaeret, et transit ad heredes et singulorum heredum heredes singulos in solidum. p. 2. n. 222.

[324] Hence arises another difference between indivisibility and solidity; the latter not proceeding from the quality of the thing due, but from the personal act of the co-debtors, who have each contracted the entire obligation, they are debtors not only of the whole thing, but are so likewise *totaliter*; though the primary obligation, which they have contracted in *solido*, be converted by its non-execution into a secondary obligation, they are bound in *solido* for this secondary obligation, as they were for the primary. For instance, if two persons are obliged in *solido*, to build me a house in a certain time; in case of the non-performance of this primary obligation, they will each be liable in *solido* to the obligation of damages, into which the primary obligation is converted.

On the contrary, when the obligation is not in *solido*, but indivisible, as when several persons are obliged without solidity to something indivisible; in this case, the indivisibility only proceeding from the quality of the thing due, which is not susceptible of parts, the debtors are indeed each of them debtors of the whole, as they cannot be debtors in part of a thing, which is not susceptible of parts, *singuli solidum debent*; but not being obliged in *solido*, *non debent totaliter*; *aliud est*, says Dumoulin, p. 3. n. 112. *quem teneri ad totum, aliud totaliter*; being debtors for the whole only on account of the quality of the thing due, which is not susceptible of parts, if the primary obligation be converted into the secondary obligation of a divisible thing, these debtors would only be bound each for his part. For instance, if two men have obliged themselves without solidity, to build me a house, although they be bound each for the whole, as to the primary obligation, because it has for its object an act which is not susceptible of parts; nevertheless, in case of the non-execution of this obligation, they will only be liable each for his own portion in the secondary obligation of damages, into which the primary one is converted, because these damages consist in a sum of money which is divisible: it follows, that *longe aliud est plures teneri adidem in solidum, et aliud obligationem esse individuum*; this is also one of the clefs of Dumoulin. *ibid.*

The same observation applies with respect to several creditors, or the several heirs of one creditor, of an indivisible thing; they are creditors of the whole, *singulis solidum debetur*, but they are not so *totaliter*,

totaliter, as the creditors in *solido* are, who are called “*correi credendi, et aliud est pluribus deberi idem in solidum, aliud obligationem esse indivisum*,” all this will be more clearly explained in *decurfu*, in the following paragraphs.

[325] From this principle, that *aliud est debere totum, aliud est debere totaliter*, it follows, that an indivisible obligation may notwithstanding be susceptible of retrenchment. For instance, if my relation, by his will, has charged me with a legacy of a right of servitude over my estate in favour of *Peter*, and there only remains in the succession, after all the debts are discharged, the sum of two hundred, and this right of servitude be worth three hundred pounds, though the legacy and the obligation which results from it be indivisible, the right of servitude, which is the object of it, being indivisible, nevertheless, as I am not subject to this obligation, *totaliter*, but only to the amount of the two hundred pounds, which I received as the nett produce of the succession, this legacy and obligation, although indivisible, would be subject to retrenchment, not indeed with respect of the thing itself, which is bequeathed, and which is not susceptible of parts, but with respect to its value; therefore I should owe to the legatee an entire right of servitude, but so that he could not demand it without accounting to me for the sum that it is worth more than the two hundred pounds, to which amount alone, I am chargeable with the legacy. *Arg. l. 76. (a) ff. de Leg. 2.*

§ II. *Of the Effect of the Indivisibility of Obligations, in dando aut in faciendo, with respect to the Heirs of the Creditor.*

[326] When the obligation is indivisible, each heir of the creditor being creditor of the whole thing, it follows, that each of the heirs may demand the whole thing from the debtor.

For instance, if any one has engaged in my favour to grant, or procure me for the use of my estate, a right of passage over his or over any other neighbouring estate, this right being indivisible,

(a) Cum filius divisim tribunalibus actionem inofficiosi testamenti matris pertulisset, atque ita variae sententiae judicium extitissent, heredem, qui filium vicerat, pro partibus, quas aliis coheredibus abstulit filius, non habiturum praeceptiones sibi datas, non magis quam ceteros legatarios actiones, constitit. Sed libertates ex testamento competere placuit, cum pro parte filius de testamento matris litigasset: quod non erit trahendum ad servitutes, quae pro parte minui non possunt. Plene petetur integra servitus ab eo, qui filium vicit: partis autem aestimatio restituitur; aut si paratus erit filius precio servitutem praebere, doli summovebitur exceptio legatarius, & non offerat partis aestimationem, exemplo scilicet Legis Falcidiae.

each of my heirs may institute a demand for the whole against the debtor. *l. 2. § 2. ff. de verb. Oblig. (a)*

So, if any one engages to make me a picture, or to build me a house, each of my heirs may demand of him to make the whole picture, and to build the whole house.

But as each of my heirs, although creditor of the whole thing, is not creditor *totaliter*, if upon the demand of the whole by one of my heirs the debtor, for want of executing his obligation, is condemned in damages, the condemnation in favour of this heir will only extend to that proportion of the damages for which he is heir; for although creditor of the whole, he is nevertheless only creditor as my heir for part; if he has a right to demand the whole thing, it is because the thing cannot be demanded in parts, not being susceptible of them; but the obligation of this indivisible thing, being converted by the non-execution of it, into an obligation of damages, which is divisible, my heir in part can claim no greater share of the damages, than the part for which he is heir. *l. 25. § 9. ff. Fam. Ercisc.*

In this respect, the heirs of the creditor of an indivisible debt differ from the creditors in solido, who are called *correi credendi*; each of the latter being creditors not only of the whole thing due, but also *totaliter*; if upon the demand of the creditor, the debtor does not fulfil his obligation, he must be condemned to the creditor for the whole damages.

[327] From this principle, that the heir in part of an indivisible debt, though creditor of the whole thing, is not so *totaliter*; it follows also, that he cannot make an entire release of the debt, which a creditor in solido might. *l. 13. § 12. ff. de Accept. (b).*

Therefore, if the creditor of an indivisible debt has left two heirs, and one of them has made a release to the debtor so far as concerns himself, the debtor will not be liberated as against the others. Nevertheless, this release will have an effect. The other heir may indeed demand from the debtor the entire thing, but he can only do it by offering a moiety of the value of the thing: for the thing due, though indivisible in itself, has, nevertheless, a value which is divisible, and to which recourse may in this case be had; this is a modification which in such a case is made of the indivisibility of the debt.

(a) Si divisionem res promissa non recipit, veluti via: heredes promissoris singuli in solidum tenentur, ex quo quidem accidere Pomponius ait ut et stipulatoris via, vel itineris heredes singuli in solidum habeant actionem.

(b) Ex pluribus reis stipulandi si unus acceptum fecerit, liberatio contingit in solidum.

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It would not be sufficient for the debtor to offer to him who has not released his right, the half of the price of the thing due; for the heir is creditor of the thing itself, and one co-heir cannot, by releasing his own right, prejudice that of the other; this is what *Dumoulin* lays down *Tr. de divid. et individ. p. 3. n. 189. Stipulator servitutis reliquit duos heredes, quorum unus accepto fecit promissori. Debet alteri heredum totam servitutem sed non totaliter, ut pote deducenda aestimatione dimidia partis, sed cujus est electio? breviter dico creditoris, videlicet alterius heredis, quia coheres etiam vendendo et pretium recipiendo nocere non potuit, nisi in refusione pretii, si hic heres noluit jus suum vendere: igitur gratis remittendo non potest in plus nocere.*

[328] The same rule should apply when the debtor, as to one moiety, becomes heir of the creditor: the other may demand from him the entire thing, offering to account for the moiety of the value.

[329] Every thing which we have said of several heirs of the creditor of an indivisible debt, may be applied with regard to several creditors not in solido, in whose favour a like debt has been contracted.

§ III. *Of the Effect of Indivisible Obligations, in dando aut in faciendo, with respect to the Heirs of the Debtor.*

[330] When the debt is indivisible, each of the heirs of the debtor, being debtor for the whole thing, it follows, that the creditor may institute a demand against each of the heirs for the whole; but as he is not debtor for it *totaliter*, but only as heir of the debtor in part, and jointly with his co-heirs, it also follows, that being assigned he may demand a stay of proceedings in order to have his co-heirs included in the cause, and ought not to be condemned alone except in default of requiring to have them included.

Dumoulin founds this decision on the law 2. § 23. *ff. de Leg. 3.* “*Si in opere civitatis faciundo relictum sit, unumquemque heredem in solidum teneri D. Marcus et Verus Procula rescripserunt tempus tamen coheredi Procula, quam Procula vocari desideravit ut secum curaret opus fieri prestiterunt, intra quod mittat ad opus faciendum, postquam solam Proculam voluerunt facere, imputaturam sumptum coheredi.*” *Dumoulin, p. 3. n. 90. & 104. p. 2. n. 469. et seq.*

In this respect these co-heirs differ from persons obliged together in solido, who are called *correi debendi*, each of whom owes, *totam rem et totaliter*; and are consequently not allowed to demand a stay of proceeding in order to have their co-debtors included in the

cause (except as a matter of favour, which however is always allowed) but are obliged to pay as soon as they are judicially required, and can only demand from the creditor a cession of his actions against the others after discharging the debt. *Dumoulin* establishes this difference, *p. 3. n. 107.*

[331] Further, when the heir, who is assigned by the creditor of an indivisible debt, is only heir for a small part, and there is an heir for a greater part, as, if in the customary Provinces of *Anjou, Touraine*, and some others, the creditor assigns a younger brother who is only heir for a small part, the elder brother of a noble family being the principal heir in this case, the heir assigned may not only demand a stay of proceeding, in order to assign his co-heirs, but he may also demand that the creditor himself shall proceed against this principal heir, the younger offering to contribute to the demand. *Dumoulin, ibid. n. 105.*

[332] For the rest, as to the effect of an indivisible obligation, *in dando vel in faciendo*, with respect of heirs of the debtor, we must distinguish with *Dumoulin* three cases: either the debt is of such a nature, that it can only be acquitted by the particular heir of the debtor who is assigned, or may be acquitted separately either by him who is assigned, or by each of his co-heirs, or it is such that it cannot be discharged but by the whole conjointly.

We may adduce, as an example of the first case, the debt of a right of prospect, or of passage which the deceased has promised to impose upon one of his estates that has fallen by the division to one of his heirs; it is only this heir, to whom the estate has fallen by the division, who can discharge this debt, because a servitude can only be imposed by the proprietor of the estate; in this case he alone will be condemned to afford the right of servitude, and he may be compelled so to do by a sentence, ordaining, that in his default to do so, the sentence itself shall avail as a sufficient title, *Dumoulin, p. 3. n. 100*, saving his recourse for indemnity against his co-heirs, if he has not been charged by the partition with the acquittance of this debt.

[333] We may adduce, as the first example of the second case, the debt of a like servitude, which the deceased had engaged to procure in the estate of a third person; the thing which is the object of this obligation is indivisible, and by its nature may be acquitted separately by each of the heirs of the debtor; for it is possible for each of them to agree with the proprietors of the estate, in which the deceased has promised his creditor to procure him a right of servitude; the creditor may then demand this right of servitude in the whole, from each of the heirs of the debtor, since this

right

right being indivisible each of them is liable for the whole ; but as this heir, though debtor for the right of servitude for the whole, is however not liable *totaliter*, and is liable for it conjointly with his co-heirs, he may demand a stay of proceeding, to have them included in the cause, so that he and the other heirs jointly may procure to the creditor the right of servitude, or in default of so doing, they may all be condemned in damages ; and being so condemned, they will only be liable for their parts, because this obligation of damages is divisible.

But if he neglects to require that his co-heirs be included, he will be condemned alone to procure the right of servitude ; and in default of this he will be singly condemned in damages, saving his recourse against his co-heirs. *Dumoulin*, p. 2. n. 175, for, having neglected to require that they should be included, he ought singly to be subject to the condemnation ; he is liable in this case, *quasi ex facto proprio et non tantum quasi heres*.

Observe, that this condemnation of damages should take place, even when the heirs of him who promised this servitude, are ready to purchase it from the proprietor of the estate, upon which the deceased promised to impose it, and the proprietor refused to grant it at any price whatever ; for, as we have seen elsewhere, it is sufficient to render the obligation valid, and to give a right to damages upon the non-performance of it, if the thing be in itself possible, although it be not in the power of the deceased who has promised it, or of his heirs ; the person who has contracted the obligation must blame himself for having rashly engaged for the act of a third person.

A second example, is the obligation which I may have contracted with any one, to build a certain edifice upon his land ; this obligation is indivisible ; the creditors may conclude against each of my heirs, requiring him to be condemned to build the entire edifice ; but as each of my heirs, although debtor for the entire construction of the edifice, is nevertheless not debtor in solido, he has a right to require that his co-heirs be included in the cause, that in default of their fulfilling this obligation, they may be condemned in damages, each only for his own hereditary part.

For the rest, those who were ready to concur in it, will not be less included in the judgment, than those who refused to do it, saving their recourse among themselves, because each of them is obliged to build the entire edifice, and it is a thing which each of them may do separately.

If one of my co-heirs, assigned for the construction of the entire edifice, does not require his co-heirs to be included in the cause, he

he may be condemned alone in damages for the whole, in case of the non-execution of the obligation; as it is his own fault not to have assigned his co-heirs.

[334] It remains to speak of the third case, in which the indivisible debt can only be acquitted, jointly by all the persons obliged; we may adduce, as an instance, the case, in which a person by a transaction obliges himself in your favour to assign you a right of passage upon his estate, to go to yours in a part to be appointed by him: if he dies before the accomplishment of the obligation, and has left several heirs, amongst whom this estate is held in common, the obligation of imposing the right of passage to which they succeed, is in indivisible obligation, which can only be discharged jointly by them all; as a right of servitude cannot be imposed upon an estate, but by all those who are proprietors of it. *l. 2. (a) ff. de Serv. l. 18. ff. Comm. Præd.*

In the case of this kind of obligation, if one of the heirs declares that he is ready, as far as is in his power to accomplish the obligation, and that the accomplishment of it only depends upon the other heir, he only who refuses ought to be condemned in the damages resulting from the non-execution; for he that offers is not in default. *Dumoulin, ibid. p. 3. n. 95.*

But if a penalty had been stipulated in case of the non-execution of the obligation, the co-obligor, or co-heir, who was not in default, would nevertheless be subject to his part of the penalty, for the default of the other, *non immédiate, sed ejus occasione et tanquam ex conditionis eventu*, as in the case of divisible obligations, saving his recourse against his co-obligor.

[335] Observe, that the law 25. § 10. *ff. Fam. Ercisc.* does not contain any thing contrary to the distinctions which we have made: for, as *Dumoulin* remarks, *p. 3. n. 99.* this text does not suppose, that one of the heirs of the debtor of an indivisible thing, should be always and indiscriminately bound to pay the value of the whole, in case of the non-execution; but only decides, that in the case in which he would be bound for it, as, if he had omitted to have his co-heirs included in the cause, who were liable as well as himself, he has the action *familie erciscunde*, against them to account to him for their proportion.

§ IV. *Of the Effect of Indivisible Obligations in non faciendo.*

[336] When any one is obliged, in favour of another, not to do any thing, if what he obliges himself to do, is any

(a) *Unus ex dominis communium, ædium servitutem imponere non potest.*

thing indivisible, as if he obliges himself to his neighbour, not to hinder him from passing through his estates, the contravention of any one of his heirs gives a right of action to the creditor against all the heirs, that they may be prohibited from such contravention, and that they may be condemned in damages, with this difference, that he who has contravened the obligation, ought to be condemned for the whole, *quia non tenetur tantum tanquam heres, sed tanquam ipse, et ex facto proprio*, and that the other heirs should be condemned for the part only for which they are heirs, and saving their recourse against him who has been guilty of the contravention, that he may be bound to pay in their discharge, or to indemnify them, if they have been already obliged to pay: they are not like the heir who has contravened the obligation liable in solido, but only for their hereditary part, *quia tenentur tantum ut heredes*. It is in this sense that *Dumoulin* teaches us to understand the law 2. § 5. ff. de verb. Oblig. “*Si stipulatus fuero per te non fieri, neque per heredem tuum quominus mihi ire agere liceat et unus ex pluribus heredibus prohibuerit, tenentur et coheredes ejus, sed familie erciscunda repetent ab eo quod prestiterint.* p. 3. n. 168. et seq. For the rest, so far as respects the creditor, those who have not contravened the engagement, are bound for their parts of the damages arising from the contravention of their co-heir, and in his obligations *in non faciendo* differ from those *in faciendo*, for when the obligation consists in doing something indivisible, which cannot be done separately by each of the heirs of the debtor, but which should be done by both together, and one of the two presents himself to do it, whilst the other refuses to concur, we have seen n. 334, that, according to the opinion of *Dumoulin*, the creditor had no action against him who was not in default, but only against him who had refused.

The reason of the difference is, that it is the default of the debtor, which is the cause of action in obligations *in faciendo*: whence it follows that it cannot be maintained against him who is ready, *quantum in se est*, to fulfil the obligation, and who consequently, is not in default: on the contrary, in obligations *in non faciendo*, it is the act itself from which the debtor has promised that he and his heirs would abstain; therefore the act of one of the heirs induces a right of action against all: it may be supposed that such was the intention of the contracting parties, because otherwise he, in whose favour the debtor obliges himself not to do any thing, would not have a sufficient security, and it would often happen that when one had done what it had been stipulated should not be done, he could not proceed against any one for want of knowing by whom it was done; as it is often difficult, when the thing

has

has been done, to know who has done it, whereas in obligations which consist in doing any thing, it must be known who is in default on account of the judicial interpellation.

Dumoulin, p. 1. n. 27. allows the exception of discussion, to the heirs who have not contravened, by which they may oblige the creditor, in the first place, to proceed (*à discuter*) at their risks against the one who has contravened the obligation.

C H A P. V.

Of Penal Obligations. (a)

[337] A penal obligation, as we have already seen, is that which arises from the clause in an agreement by which a person, in order to assure the execution of a primary engagement, obliges himself, by way of penalty, to some other thing in case of the non-performance of such engagement: thus, if you lend me a horse for a journey, and I engage to return him safe and sound, and to pay you fifty pistoles if I do not do so; this obligation, which I contract to pay you fifty pistoles in case I do not return him, is a penal obligation.

To treat this matter with order, after having stated, in the first article, the general principles respecting the nature of penal obligations, we shall see in the second, in what cases the penalty is incurred; we shall examine, in the third, whether the debtor can, by partially discharging his obligation, avoid the penalty as to part: we shall consider, in the fourth, whether the penalty is incurred for the whole, and by all the heirs of the debtor by the contravention of one of them; and, in the fifth, whether a contravention against one of the heirs of the creditor causes the penalty to be incurred for the whole, and in favour of all such heirs.

A R T I C L E I.

Of the Nature of Penal Obligations.

First Principle.

[338] A penal obligation being in its nature accessory to a primary and principal obligation, the nullity of such principal obligation, necessarily induces the nullity of the other; the reason is, that it is the nature of every accessory that it cannot

(a) See Appendix, No. XII.

subsist without its principal, *quum causa principalis non consistit, ne ea quidem, quæ sequuntur locum obtinent*, law 129. § 1. ff. de Regul. Jur. Besides, the penal obligation being the obligation of a penalty stipulated, in case of the non-performance of the primary obligation, if the primary obligation is not valid, the penal obligation cannot take place, as there can be no penalty for the non-performance of an obligation, which not being valid, neither could nor ought to be executed.

The law 69. ff. de verb. Oblig. affords an example of our decision: you promise to give me a certain slave, not knowing of his death, and to pay me a sum of money by way of penalty, in case you fail to do so; *Ulpian* decides that the obligation for the penalty is no more binding than the principal obligation which cannot be binding because it is impossible. *Si homo mortuus fuisse non potest, nec pœna rei impossibilis committetur; quemadmodum si quis Stichum mortuum dare stipulatus, si datus non esset, pœnam stipuletur.*

[339] This principle, that the nullity of the primary obligation induces that of the penal obligation, is subject to an exception in the case of an obligation, in the accomplishment of which, the person with whom it is contracted has not any appreciable interest; as, *cum quis alteri stipulatus est*. We have seen above n. 54, that such an obligation was null; nevertheless, the penal obligation, which is added to it, is valid: *alteri stipulari nemo potest; plane si quis velit hoc facere, pœnam stipulari conveniet; ut nisi ita factum sit ut est comprehensum, committatur pœna stipulatio etiam ei, cujus nihil interest, &c.* Jusit. Tit de Inut. Stip. § 19. The reason is, that the principal obligation is only null in this case, because the debtor may contravene it with impunity, the person with whom it was contracted not having any claim for damages in case of non-performance: the penal obligation purges this defect by taking away the impunity.

So, though one man cannot enter into a valid undertaking for the act of another, the penal obligation, added to an agreement by which any one has promised for the act of a third person, is valid, because the penal clause shews that the person promising, did not simply intend to promise for the act of another, but personally engaged to procure the act to be done; and consequently he promises *non de alio, sed de se*, n. 56.

Frain, in his collection of the *arrêts* of the parliament of *Britany*, adduces one of the 12th January 1621, which was decided upon this principle. The relation of a canon, who had given offence to the bishop of *St. Maloes*, had promised the bishop that the canon should not appear in that city for four months, and in case

case of contravention engaged to pay the sum of 300 livres. The case having happened, it was judged that the contravention was valid, and that the penalty had been incurred.

Second Principle.

[340] The nullity of the penal obligation does not induce that of the primary. The reason is, that the accessory cannot indeed subsist without the principal, but the principal may subsist without the accessory, and is no wise dependant upon it, *l. 97. ff. de verb. Oblig. Si stipulatus sum te fisti, nisi steteris hyppocentaurum dari, perinde erit atque si te fisti solummodo stipulatus essem*; and as *Paulus* says in the law 126. § 3. d. *Tit. detractâ secundâ stipulatione, prior manet utilis.*

Third Principle.

[341] The object of the penal obligation is to assure the execution of the principal. Therefore it should not be presumed that the parties have intended either to make it extinguish the principal obligation, or to found the principal obligation upon it. *l. 122. (a) § 2. ff. de verb. Obligationibus.*

Therefore, where the penal obligation attaches from a default in executing the principal, the creditor may, instead of enforcing the penalty, proceed upon the principal obligation. (b). *l. 28. ff. de Act. Empt. l. 122. § 2. ff. de verb. Obl. & passim.*

When the parties who stipulate that a certain sum shall be paid, upon the non-performance of an anterior obligation, intend that, in case of default, nothing shall be paid but the sum so agreed upon, this is not a penal stipulation; the obligation which results

(a) *Flavius Hermes hominem Stichum Manumissionis causa donavit, et ita de eo stipulatus est: SI HOMINEM STICHUM DE QUO AGITUR, QUEM HAC DIE TIBI DONATIONIS CAUSA MANUMISSIONISQUE DEDERIS, A TE HEREDEQUE TVO MANUMISSUS VINDICTAQUE LIBERATUS NON ERIT: QUOD DOLO MALO MEO NON FIAT; PÆNÆ NOMINE QUINQUAGINTA DARI, stipulatus est Flavius Hermes, spondit Claudius: quæro, an Flavius Hermes Claudium de libertate Stichi convenire potest? Respondit nihil proponi, cur non potest. Item quæro, an si Flavii Hermetis hæres à Claudii hærede pœnam superscriptam petere voluerit, Claudii hæres libertate Sticho præstare possit ut pœna liberetur? Item quæro, si Flavii Hermetis hæres cum Claudii hærede ex causa superscripta nolit agere, an nihilominus Sticho libertas ex conventionem, quæ fuit inter Hermetem et Claudium, ut stipulatione superscripta ostenditur, ab hærede Claudii præstari debeat? Respondit debere.*

(b) *Prædia mihi vendidisti; & convenit ut aliquid facerem; quod si non fecissem, pœnam promissi, Respondit, venditor, antequam pœnam ex stipulatu petat, ex vendito agere potest: si consecutus fuerit, quantum pœnæ nomine stipulatus esset, agentem ex stipulatu doli mali exceptio summovebit, si ex stipulatu pœnam consecutus fuerit ipso jure ex vendito agere non poterit: nisi in id, quod plaris ejus interfuerit, id fieri.*

from

from it is not a penal obligation, but as much a principal obligation as the first, of which the parties intended to make a novation : it is this kind of case which is mentioned in the law (a) 44. § *fin. ff. de Obl. & Act.*

Upon the question, whether the parties intended that there should be such a novation, see Part 3, ch. 2, Art. 4, § 2.

Fourth Principle.

[234] This penalty is stipulated with the intention of indemnifying the creditor for the non-performance of the principal obligation; it is consequently compensatory of the damages which he suffers from such non-performance.

Hence it follows, that he ought in this case to elect, either to claim the execution of the principal obligation, or the penalty; that he ought to be satisfied with one of them; and that he cannot exact both.

However, as the penal obligation cannot invalidate the principal, if the penalty which the creditor has received for the non-performance of the principal obligation is not a sufficient indemnification, he may still demand damages resulting from the non-performance of the principal obligation, making an allowance and deduction for the penalty which he has already received; this is the decision of the laws, 28 *ff. (b) De Act. Empt.* 41 (c) & 42 (d) *ff. pro socio.*

But the judge ought not too readily to listen to the creditor, who pretends that the penalty he has received was not a sufficient indemnification for the non-performance of the agreement; for the parties having, by fixing the penalty themselves, regulated the damages that may result from the non-performance of the agreement, the creditor, by demanding greater damages, seems to act in opposition to an estimation, which he himself has made, and this ought not to be allowed, at least unless he has proof at hand, that the damage sustained by him exceeds the penalty agreed upon; as in the following case, if a tradesman lends me his caravan upon condition that I shall return it by a certain day, when he will have occasion for it to carry his goods to a particular fair, under the

(a) Si navem fieri stipulatus sum, & si non feceris, centum : videndum utrum duæ stipulationes sint, pura & conditionalis & existens sequentis conditio non tollat priorem ; an vero transferat in se, & quasi novatio prioris fiat ? quod magis verum est.

(b) See supra, No. 341.

(c) Si quis à socio pœnam stipulatus sit, pro socio non aget, si tantundem in pœnam sit, quantum ejus interfuit.

(d) Quod si ex stipulatu eam consecutus sit, postea pro socio agendo, hoc minus accipiet, pœna ei in sortem imputata.

penalty of 30 livres in case of my failing to do so; he may refuse taking the 30 livres as a satisfaction, if he has proof at hand that he was obliged to hire another carriage for 50 livres, and that that was the common price at the time when I ought to have returned him his own.

[343] As a penal clause does not deprive the person who has stipulated the penalty of the action arising from the principal engagement, neither does it deprive him of his exceptions arising therefrom.

For instance, if I have agreed with a minor, who is now arrived at his majority, that he should not impugn the sale of an estate which he made to me during his minority, and I have stipulated with him by way of penalty a certain sum in case he contravenes the agreement; if he afterwards proceeds against me by letters of rescission to set aside the alienation, the penal clause inserted in our agreement will not hinder me from opposing against his demand the *fin de non-recevoir*, or estoppel, which results from the principal engagement contracted by our agreement, that he will do no act in opposition to this alienation. But as the person who has stipulated the penalty cannot take both the penalty and what is included in the principal engagement, if I take advantage of the *fin de non-recevoir*, and get the demand declared to be inadmissible, I can no longer demand from him the penalty which I stipulated for, and *vice versa*, if I have exacted from him the penalty, I shall not be allowed to take advantage, the *fin de non-recevoir*, as may be collected from the law, (a) 10. § 1. ff. de part.

The decision of this law has nothing contrary to that of the law (b) 122. § 6. ff. de verb. oblig. adduced *infra* in the following article, N° 348, when you have agreed with me after having attained your majority, that you would not impeach the sale of an estate made to me in your minority, under a certain penalty, the object of this agreement is to procure me the liberation from the rescisory action which you have against me; therefore, by opposing to you the *fin de non-recevoir* which results from this agreement, and by thus procuring a declaration that your action is inadmissible, I have procured a liberation from such action, and can no longer

(a) Si pacto subjecta sit pœnæ stipulatio, queritur, utrum pacti exceptio locum habeat, an ex stipulatu actio? Sabinus putat, quod est verius, utraque via uti posse, prout elegerit qui stipulatus est; si tamen ex causa pacti exceptione utatur, æquum erit accepto eum stipulationem ferre.

(b) Duo fratres hereditatem inter se diviserunt, & caverunt sibi, nihil se contra eam divisionem facturos; & si contra quis fecisset pœnam alter alteri promisit: post mortem alterius: qui supervixit, petit ab heredibus ejus hereditatem, quasi ex causa fidei commissi sibi à patre relictæ deebitam & adversus eum pronunciatum est, quasi de hoc quoque transactum fuisset: quesitum est, an pœna commissæ esset? Respondit, pœnam secundum ea, quæ proponuntur, commissam.

demand the penalty from you, otherwise I should at the same time have both the thing and the penalty, which cannot be; such is the law, 10. § 1. *ff. de pact.* which we have just adduced; that of the law 122, which is opposed to us, is very different. Upon a partition which is in itself valid and not subject to any rescisory action, but under the apprehension that a law-suit, although ill-founded, may possibly be instituted, we agree not to contravene the partition under a certain penalty; the object of this agreement is not, as in the preceding instance, to procure me a liberation from a rescisory action, for you are not intitled to any such; the only object is not to be involved in a law-suit; therefore, if you institute any action, although it is decided in my favour, the penalty will attach: for as the only object was the avoidance of a law-suit, and as you have engaged me in one, though ill-founded, you have deprived me of that object, and therefore the penalty will attach.

[344] Our rule, that the creditor cannot, at the same time, have both the principal and penalty, is subject to an exception, not only when it is expressly said in the penal clause, that if the debtor does not accomplish his obligation, the penalty shall be incurred and due, without prejudice to the principal obligation, which is expressed in these terms, *rato manente pacto*, l. 16. (a) *ff. de transf.* but also, whenever it appears that the penalty is stipulated for the reparation of what the creditor may suffer, not from the absolute non-performance, but merely from the delay in the execution; for, in this case, the creditor who has suffered the delay, may take both the principal and the penalty.

Fifth Principle.

[345] The penalty stipulated in case of the non-performance of an obligation may, when excessive, be reduced and moderated by the judge.

This principle is deducible from a decision of *Dumoulin* in his treatise *de eo quod interest*, n. 159 & seq. the foundation of it is, that the penalty is in its nature a substitution for the damages which may be claimed by the creditor, in case of the non-performance of the obligation; then, says he, as the judge should reduce the damages claimed by the creditor when they amount to an excessive sum, and the law *Cod. de sent. qua pro eo quod*

(a) Qui fidem licite transactionis rupit, non exceptione tantum summovebitur sed et penam, quam si contra placitum fecerit, rato manente pacto stipulanti recte promiserat, prestare cogetur.

interest prof. (a) does not allow them to exceed double the value of the thing which was the object of the primary obligation; in the same manner, when the penalty stipulated in lieu of damages is excessive, it ought to be reduced: for although the penalty may in fact exceed the sum to which the damages amount, and may even be due in a case in which the creditor would not be subject to any damages at all, because it is stipulated to avoid any discussion of what damages the creditor has really suffered; but being stipulated in lieu of damages, it is contrary to its nature to be carried beyond the limits which the law respecting damages prescribes; if the law above cited restrains them, and does not permit their being claimed *ultra duplum*, even when the non-performance of the contract, may in fact have occasioned a greater loss, so that the creditor *versatur in damno*; à fortiori, the judge ought to moderate the excessive penalty, to which the debtor has inconsiderately submitted, when the creditor has suffered no loss, or one much below the penalty stipulated, and consequently *certat de lucro captando*; lastly, *Dumoulin* founds himself upon the text of the said law *cod de sent, pro eo quod interest, &c.* which in the generality of its terms seems to include conventional, as well as all other kinds of damages.

Azon is of a contrary opinion to that of *Dumoulin*, and decides that a conventional penalty stipulated by way of damages is not subject to any moderation; it may be said, in favour of his opinion, that there is a difference between conventional damages, and damages which are not regulated by the contract; in regard of the latter, it is very true, that the debtor in contracting a primary obligation is deemed to have contracted a secondary obligation of the damages which may result from the non-performance of it; but it may be presumed, that he did not intend to have obliged himself *in infinitum*, but only *intra justum modum*, and so far as the sum to which it was probable the damages might amount; but the same cannot be said of conventional damages; for *ubi est evidens voluntas, non relinquitur presumptioni locus*; however excessive the sum stipulated by way of penalty, in case of the non-performance of the agreement, may be, the debtor cannot dispute his having intended to oblige himself to that extent, when the clause of the contract is express. Notwithstanding these reasons, the decision of *Dumoulin* seems more equitable; when a debtor submits to an excessive penalty, in case of the non-performance of his primary obligation, there is reason to presume that he was induced to do so under a false confidence, that he should not fail in the performance of the

primary obligation, and supposed himself to engage for nothing by submitting to it, and that he would not have submitted to it, if he had supposed that the penalty could have been incurred; and therefore that the consent which he gives to the obligation of so excessive a penalty, being founded upon error and illusion, is not valid. Therefore, these excessive penalties ought to be reduced to what the damages of the creditor, resulting from the non-performance of the primary obligation, may probably amount at the highest: this decision should take place in commutative contracts, because the equity which ought to prevail in these contracts does not permit one of the parties to profit and enrich himself at the expence of the other, and it would be contrary to this equity, that the creditor should enrich himself at the expence of the debtor, by requiring from him a penalty too excessive, and manifestly beyond the damage which he has suffered from the non-performance of the primary obligation; the decision should likewise prevail with respect to donations, *cum nemini sua liberalitas debeat esse captiosa*.

Neither the text of the institutes *de inut. stip.* § 20, (a) nor the law 38. § 17. *ff. de verb. oblig.* (b) contains any thing contrary to the decision of *Dumoulin*, for when it is said, "*Penam cum quis stipulatur, non inspicitur quod interfit ejus, sed quæ sit quantitas in conditione stipulationis*," it only follows that the penalty may be due, although the person who stipulated suffers nothing from the non-performance of the primary obligation, or suffers less than the amount of the penalty; but by no means, that this penalty may be immense and out of all proportion to the object of the primary obligation.

With regard to the law (c) 56 *de Evict.* which supposes that a stipulation may be made in a contract of sale, for the restitution of triple or even four-fold the price, in case of eviction, a different answer may be given; *Noodt* pretends that the words *tripulum aut quadruplum* are a bad gloss, which is not in the text, and which ought to be taken from it. *Dumoulin, ibid, n. 167 et seq.* gives a better answer by saying that the question in this law does not relate to how much may be effectually stipulated in case of eviction, and

(a) Si CREDITORI suo [quis stipulatus sit] quod sua interest, ne forte vel pena committatur, vel prædia distrahantur, quæ pignori data erant: valet stipulatio.

(b) Alteri stipulari nemo potest, præterquam si servus domino, filius patri stipuletur. Inventæ sunt enim hujusmodi obligationes ad hoc, ut unusquisque sibi adquirat, quo sua interest: cæterum, ut alii detur, nihil interest mea. Plane si velim hoc facere, penam stipulari conveniet: ut si ita factum non sit, ut comprehensum est, committatur stipulatio etiam ei, cujus nihil interest. Penam enim cum stipulatur quis, non illud inspicitur, quid interfit: sed quæ sit quantitas, quæque conditio stipulationis.

(c) Si dictum fuerit vendendo, ut *simpliciter promittatur, vel tripulum aut quadruplum promittatur*, ex empto perpetua actio agi poterit.

therefore it ought not to be concluded, that in contracts of sale, a valid stipulation of the restitution of the triple or four-fold price of the eviction may be made in all cases without distinction; it is only to be concluded that such a stipulation may sometimes take place, and these cases are those in which a thing has been sold, not purely and simply, but under circumstances of the purchaser running a risk of suffering a great loss in his other goods, in case of eviction of the thing sold, which risk was foreseen and known by the contracting parties; as in this instance: I sell a tradesman a room some little time before a fair, with a declaration in the contract that it is for the purpose of putting his goods there; the risk which the purchaser runs in case of eviction, of not being able at the time of the fair to get another place, and consequently not being able to shew his goods, is the risk of a damage foreseen at the time of the contract, and which may far exceed the price of the room, and to which damage the seller submits; therefore, in this case, the damages not fixed by the contract, may be estimated at double, triple, and four-fold, the price of the thing sold; so a person may stipulate, in the same case, a penalty exceeding double the price, and the penalty in this case is not deemed excessive, on account of its not bearing a proportion to the price of the thing sold, provided it bear some proportion to the damage which the purchaser has suffered in not being able to shew his goods, since it was stipulated in lieu of such damage.

[346] It remains to be observed, that if the penalty which is stipulated in lieu of ordinary damages, is reducible when excessive, *à fortiori* ought the penalties stipulated in default of payment of a sum of money, or other thing which is consumed by use, to be reduced to the legitimate rate of interest, or even entirely rejected, in cases where it is not allowed to stipulate for interest.

A R T I C L E II.

In what Cases a Penal Obligation attaches.

§ I. *Of Cases where a Penal Clause is added to the Obligation of not doing any Thing.*

[347] It is evident, in this case, that the penal obligation attaches, and that the penalty is due as soon as the person who has obliged himself under a penalty, not to do any thing, has done what he had obliged himself not to do.

[348] Is it necessary that the fact upon which the penal obligation depends should have taken effect? This depends upon the intention of the parties.

Suppose at the end of an act of partition or transaction, (a) between you and me, we reciprocally promise not to contravene it, under a penalty to be paid by the party contravening to the other; afterwards you institute a suit against me to annul the act; this suit, although it has not had any effect, and has been dismissed, subjects you to the payment of the penalty, *arg. l. 122. (b) § 6. ff. de verb. oblig.* The reason is, that in stipulating under a certain penalty, that you shall not contravene the act, my intention was not precisely that you should not actually set it aside, which, as it was valid in itself, could not be done even without any such stipulation; what I intended to stipulate was rather, that you should not institute any process against me in opposition to it; it is sufficient then to subject you to the penalty, if you have instituted a process, though you have failed in it; it cannot be said that in this case I have the benefit both of the principal obligation and the penalty, which is contrary to the fourth principle established in the preceding Article: for the object of the principal obligation which you contracted of not contravening the act, and to which the penal obligation was attached, was that you should not institute any process against me, and this has not been satisfied, therefore I may demand the penalty.

On the contrary, if I stipulate with you under a penalty, that you shall not let your house, which is adjoining to mine, to a *peru-terer*, and you make a lease which has never been carried into execution, you will not be liable to the penalty: for my object in the stipulation was, that I should not be incommoded by the noise which persons of this trade make; the lease not having been carried into execution, has not put me to any inconvenience, and therefore the penalty ought not to attach.

[340] For the same reason *Papinian* decides in the law 6 *ff. de serv. export.* that when a slave has been sold with the condition that the buyer should not give him his freedom under a certain penalty, a void act of enfranchisement does not incur the penalty. (c)

(a) Transaction means a compromise.

(b) See n. 343, where this law is quoted.

(c) *Incredibile est, de actu manumittentis, ac non potius de effectu beneficii cogitatum.*

§ II. *Of the case in which the Penal Clause is added to an Obligation to give, or to do any thing.*

[349] In this case the penalty attaches when the debtor is put *en demeure*, to give or to do what he has promised. The *Roman* laws make a distinction, whether the agreement contains a term, within which the debtor ought to give or do what has been agreed, or whether it does not: in the first case, they decide that the penalty is due of full right, as soon as the term has expired, without it being requisite to make any judicial interpellation of the debtor, and that he cannot be discharged from it by offering, after the expiration of the term, to satisfy the principal obligation, *l. 23. (a) ff. de Obl. & Act.*

The expiration of the term appeared to the *Roman* jurists, so completely sufficient, to induce the penalty without any proceeding against the debtor, that it even attached in the case of the debtor being dead, without leaving any heirs; and consequently though there was no person who could be placed *en demeure*; this is the decision of *l. 77. (b) de verb. Oblig.*

And further the *l. 113. (c) de verb. Oblig.* decides that when the obligation to which a penal clause is added, consists in doing within a certain term a piece of work which requires a certain time for its completion, the penalty is due even before the expiration of the term, as soon as it becomes certain that the work cannot be done

(a) *Trajectilis pecuniae nomine, si ad diem soluta non esset, pœna (ut adsolet) ob operas ejus, qui eam pecuniam peteret, in stipulationem erat deducta; is, qui eam pecuniam petebat, parte exacta petere desierat: deinde, interposito tempore, interpellare instituerat. Consultus respondit, ejus quoque temporis quo interpellatus non esset, pœnam peri posse; amplius etiam si omnino interpellatus non esset: nec aliter non committi stipulationem, quam si per debitorem non stetisset, quo minus solverat alioquin dicendum est, si is, qui interpellare cœpisset, valetudine impeditus interpellare desisset, pœnam non committi.*

(b) *Ad diem sub pœna pecunia promissa et ante diem mortuo promissore: committitur pœna, licet non sit hæreditas ejus adita.*

(c) *Cum stipulatus sum mihi Proculus, si opus arbitrato meo ante calendas Junias effectum non sit, pœnam, & protuli diem: putasne vere me posse dicere arbitrato meo opus effectum non esse ante calendas Junias, cum ipse arbitrio meo aliam operi laxiorem dederim? Proculus respondit: non sine causa distinguendum est, interesse, utrum per promissorem mora non fuisset, quominus opus ante calendas Junias ita, ut stipulatione comprehensum erat, perficeretur, an, cum jam opus effici non posset, ante calendas Junias, stipulator diem in Calendis Augustis protulisset? nam si tum diem stipulator protulit, cum jam opus ante Calendas Junias effici non poterat, pœna pœnam esse commissam: nec ad rem pertinere, quod aliquod tempus ante calendas Junias fuit quo stipulator non desideravit id ante calendas Junias effici, id est, quod non arbitratus ut fieret, quod fieri non poterat: aut si hoc falsum est, etiam si stipulatus pridie calendas Junias mortuus esset, pœna commissæ non esset; quoniam mortuus arbitrari non potuisset, & aliquod tempus post mortem ejus operi perficiendo superfuisset: et propemodum, etiam si ante calendas Junias futurum esse cœpit, opus ante eam diem effici non posset, pœna commissæ est.*

within

within the term prescribed, so that the prorogation of the time which might be afterwards allowed to the debtor, would not discharge him from the penalty previously incurred.

When the obligation does not contain any stipulation of the time, within which a thing is to be given or done, the law 122. (a) § 2. *de verb. Obl.* decides, that the right of the penalty only attaches by a judicial demand, on the part of the creditor.

According to our usages, whether the primary obligation does or does not contain a term, within which it is to be accomplished, a judicial interpellation is commonly necessary to put the debtor *en demeure*, and consequently to give the creditor a right to the penalty.

It remains to observe that the penalty cannot attach, when it is by the act of the creditor, that the debtor is prevented from discharging his obligation. (b) l. 122. § 3. *de verb. Oblig.*

A R T I C L E III.

Whether a Debtor may, by discharging Part of his Obligation, partially avoid the Penalty.

[358] A debtor cannot pay his creditor against his will, a part of what he owes him, so long as his obligation, although indivisible, continues undivided, as we shall see, *infra* P. III. c. i. Art. III. § 2. Therefore an offer to the creditor to pay part of what is owing to him, cannot avoid any part of the penalty stipulated in case of non-performance, if the creditor refuses to receive such partial payment.

But if the creditor voluntarily receives a part of his debt, shall he have a right to the whole of the penalty, in default of payment of the residue? *Ulpian*, in the law 9. (c) § 1. *ff. si quis cautioni in Jud.* decides, that although, according to the subtilty of law, it may appear that in this case the penalty is incurred for the whole, nevertheless, it is equitable that it should only be so in proportion to the

(a) See N. 339, where this is quoted.

(b) *Coheredes, cum prœdia hereditaria diviserant, unum prœdium commune reliquerant sub hoc pacto : ut si quis eorum partem suam alienare veluisset, eam vel cohæredi suo, vel ejus successoribus venderet centum viginti quinque : quod si quis aliter fecisset, poenam centum invicem stipulati sunt. Quæro, cum cohæres mulier cohæredis liberorum tutores sapientius testato conveniret, et desideravit, ut secundum conventionem aut emerent, aut venderent : an, si mulier extero hique nihil tale fecerint : vendiderit, poena ab ea centum exigi possit. Respondit, secundum ea quæ proponerentur, obstatum doli mali exceptionem.*

(c) Si plurium servorum nomine, judicio sistendi causa, una stipulatione promittatur ; poenam quidem integram committi, licet unus status non sit, *Labeo* ait : quia verum sit, omnes status non esse : verum, si pro rata unius offeratur poena, exceptione doli usum eum, qui ex hac stipulatione conveniat.

part of the principal obligation which remains to be discharged: the true reason of this decision is that which is given by *Dumoulin*, and which we have above referred to, viz. that the debt being considered as a promise to compensate for the non-performance of the principal obligation, the creditor cannot have both the one and the other; then, when he has been paid a part of what is due upon the principal obligation, he can be no longer entitled to receive the penalty in respect of that part; otherwise he would receive both, which ought not to be; this is the 10th cles of *Dumoulin*, in his treatise *de Divid. & Individ.* p. 3. n. 112. *in omnibus sive individuis, sive dividuis pœna non committitur, nisi pro parte contraventionis efficacis, nec potest exigi cum principali; sed creditor non tenetur partem principalis, & partem pœna accipere.*

This may be illustrated by an example: upon selling me a farm, without any beasts to cultivate it, you oblige yourself to furnish me with two pair of oxen, under the penalty of 500 livres, in case you fail to do so; you cannot in this case oblige me to receive one pair, as I am not obliged to receive a part only of what is due to me, and consequently, the offer of one pair, if I refuse to receive them, does not prevent your being liable to me for the entire penalty; but if I voluntarily receive one pair, and you make default in furnishing me with the other, I cannot demand more than a moiety of the penalty; for having received a part of what formed the object of the principal obligation, I cannot have the whole penalty, as I am not entitled to both the one and the other.

[351] Our principle, that the penalty is only due proportionately, and in respect of the part for which the principal obligation is not executed, holds equally good whether you engage for a penalty in respect of your own act, or of that of a third person: for instance, if you undertake under the penalty of a hundred pounds, that *Peter* shall not claim from me a certain estate, the penalty will be due if *Peter* claims a moiety only of the estate, unless the contrary particularly appears to be the intention of the parties. *Dumoulin, ibid.* 3. n. 531.

[352] These decisions principally affect obligations of divisible things: it would seem that they could not be applied to obligations of indivisible things; they are however sometimes applied even to them.

Although the exercise of a predial servitude (a) is indivisible, and consequently the obligation contracted by the proprietor of the estate which is subject to it, to suffer the exercise of the servitude, is an indivisible obligation; nevertheless, if this ser-

itude is limited to a certain purpose which terminates in something divisible, and the purpose has been fulfilled in part, the penalty will be divided and will only attach in respect to the part, for which the purpose has not been fulfilled; this may be illustrated as follows :

Your estate is subject to the servitude of the occupiers, being obliged at the time of the vintage, to suffer me, to carry my produce through such estate, under the penalty of a hundred crowns in case of disturbance; in this case, if after having permitted the half of my vintage to pass, you hindered the passage of the remainder, you only incur half the penalty: for although the right of passage be indivisible, and the obligation of allowing the exercise of this servitude is the obligation of an indivisible thing, nevertheless, as the servitude is limited to the carriage of my vintage, which is a particular purpose, and my vintage is divisible, it cannot be disputed but that I have enjoyed in part the purpose, for which the servitude was imposed, and that you have allowed me the enjoyment of it, by permitting me to carry the half; and therefore I can only demand half the penalty: for I cannot receive the whole of the penalty, and enjoy in part the benefit of my right of servitude: I cannot at the same time have the one and the other: this is laid down by *Dumoulin*, in the instance supposed, *quia*, says he, *hec servitus de se individua, dividuatur ex accidenti, et ex fine dividuo, et debet judicari, secundum regulam dividuorum*, p. 3. n. 363.

[353] Our principles may likewise be in some degree applied to indivisible obligations, in the following and similar cases; you engage under a certain penalty, to give me a right of passage upon an estate of which you have the usufruct^(a); undertaking for the ratification act of the proprietors, three of the proprietors ratify it, one only refuses to impose the servitude; the penalty is indeed due to me for the whole, for the refusal of any one proprietor to impose the servitude hinders its being imposed at all, notwithstanding the ratification of the other three; as a right of servitude cannot be imposed in part, and consequently cannot be imposed without the consent of all the proprietors; but as this ratification, although it is entirely useless for imposing a real right of servitude upon the estate, nevertheless has an effect, which consists in personally obliging those who have ratified to let me pass, I cannot, without giving up this obligation, demand the whole of the penalty, but only a part of it, as I could not receive the whole penalty, and at the same time retain a part of the right

(a) An usufruct is an estate for life, or other temporary interest.

arising from the principal obligation. *Dumoulin*, p. 3. n. 473, & 474.

[354] Our principle, that the penalty is only due in proportion to the part, for which the principal obligation has not been executed, holds good even when the penalty consists in something indivisible. For instance, I have sold you an estate, and you have paid me the price, except fifty pistoles; which you engage to pay me in a year: and it is agreed between us, that in default of payment of this sum, you shall grant to me, instead of it, a right of prospect over an estate, belonging to you, and adjoining to mine; I have received from you twenty-five pistoles; in default of the payment of the remainder, I cannot require the payment of the whole penalty, but only the moiety for which the principal obligation has not been executed; and as the penalty consists in a right of servitude which is indivisible, and not susceptible of parts, I cannot demand it from you, without offering to pay you half the value of it, as only half the penalty is due. *Dumoulin*, p. 3. n. 523. & *seq. v. supra*.

A R T I C L E IV.

Whether the Penalty is incurred for the whole and by all the Heirs of the Debtor, by the Contravention of one of them.

It is necessary in this respect to distinguish between divisible and indivisible obligations.

§ I. *Decision of the Question, with respect to Indivisible Obligations.*

[355] When a primary obligation, contracted with a penal clause, is the obligation of an indivisible thing, the contravention of it by one of the heirs of the debtor, entitles the creditor to the whole penalty, not only against him who has caused it to attach by his contravention, but also against all his co-heirs, who are liable for the parts for which they are respectively heirs, saving their recourse against him who is guilty of the contravention.

For instance, if any one obliges himself to allow me a right of passage over his estate, under the penalty of 10 livres, in case of interruption; if any one of the heirs of the debtor shuts up the passage

passage against me, although without the participation, and contrary to the will of his co-heirs, the entire penalty will be incurred, and that against each of the heirs of my debtor, who will be respectively liable for their hereditary parts; for the thing, which is the object of the primary obligation, being indivisible, as it is not susceptible of parts, the contravention of one of the heirs is a contravention to the whole obligation, and consequently, the whole of the penalty is incurred by all who are liable to it, as heirs of the debtor, who had obliged himself to such penalty in case of contravention. This is the decision of Cato in the law 4. § 1. ff. de verb. Oblig.

“Cato scribit: *pœna certa pecunie promissa: si quid aliter sit factum; mortuo promissore, si ex pluribus heredibus unus contra quàm cautum sit, fecerit; aut ab omnibus heredibus pœnam committi pro portione hereditaria, aut ab uno pro portione sua: ab omnibus, si id factum de quo cautum est individuum sit, veluti iter fieri quia quod in partes dividi non potest, ab omnibus quodam modo factum videretur.*” And a little lower, “*omnes commississe videntur, quod nisi in scilicet peccari poterit, illam stipulationem per te non fieri quominus mihi ire agere liceat.*”

The jurist *Paulus*, decides the same thing in the law 85. § 3. ff. Dic. Tit. “*quoniam licet ab uno prohibeor, non tamen in partem prohibeor,*” and he adds, “*sed ceteri familie eriscunda judicio sarcient damnum.*”

As each of the heirs is only liable to the penalty, for the part for which he is heir, they are in this respect different from debtors in solido, who are debtors of the penalty for the whole, when it is incurred by one of them, as they are also for the principal obligation.

[356] Can the creditor demand the whole of the penalty from the heir who made the contravention? The reason for doubting is, that the law does not say so, and that it says on the contrary, that the penalty is due by all the heirs, for their hereditary portion only. It may be added, that the contravention of the heir does not incur the penalty, except in as much as such contravention is in the nature of a condition, upon which the obligation of the penalty has been contracted by the deceased; and this debt of the penalty being a debt of the deceased, and divisible, the heir can only be bound for the portion for which he is heir, and for which he succeeds as such to the debts of the deceased.

It must be decided nevertheless, that the heir, who contravenes the indivisible obligation contracted by the deceased, becomes debtor for the whole penalty: it cannot be doubted but that he

is liable to it at least circuitously and indirectly ; for, as he is liable to acquit his co-heirs of the parts for which they are bound, the creditor ought to be admitted, in order to avoid a circuitry of actions, to demand from him not only for his own part of the penalty, but that of his co-heirs whom he is bound to indemnify, and consequently the whole.

Dumoulin, p. 3. n. 173 & 174, *et passim alibi*, goes further, and maintains that this heir owes the whole penalty, not only circuitously, but also directly ; for, the primary obligation being supposed to be indivisible, he is debtor for the whole of it, and debtor under the penalty agreed upon ; now, his contravention of an obligation for the whole of which he is bound, should make him incur the whole penalty. This is supported by an argument deduced from the law 9. (a) *ff. de pos.* ; where it is decided, that a particular heir of the depositary who by his own act has caused the loss of the thing deposited with the deceased, is answerable to the person who deposited it, for the whole of the damages ; because, although the principal obligation of restoring the thing deposited, is divisible, the accessory obligation of good faith in the preservation of the thing deposited is indivisible, to which each of the heirs of the dispositive is liable for the whole, and which makes him debtor for the whole of the damages of the creditor, when he contravenes it ; and if an heir for part, who by his own act contravenes an indivisible obligation of the deceased, is debtor for the whole of the damages, he should be so likewise for the whole of the penalty, since the penalty is in lieu of damages, and is only the liquidation of them agreed upon by the parties themselves : such is the reasoning of *Dumoulin*.

With regard to the first objection deduced from § *Cato*, the answer is, that when *Cato* decides that in indivisible obligations the contravention by one of the heirs causes the penalty to be incurred against each of them for their hereditary portions, he only means the heirs who have not participated in the contravention ; with regard to the second objection, that the obligation of the penalty being a divisible obligation contracted by the deceased, each heir can only be bound for the part for which he is heir, the answer of *Dumoulin*, is, that this is true when the heir is only liable as heir, *tanquam heres* ; but when he is liable *ut ipse, et ex proprio facto*, he is answerable for the whole, and this is one of his clefs to decide questions upon this subject ; *aliud est teneri heredem ut heredem, aliud teneri ut ipsum*. *Tr. de div. et indiv. p. 3. n. 5. & 112.*

(a) In depositi actione, si ex facto defuncti agatur adversus unum ex pluribus heredibus, pro parte hereditaria agere debeo : si vero ex suo delicto, pro parte non ago ; merito : quia æstimatio refertur ad dolum, quem in solidum ipse heres admisit.

[357] It being established, that the heir who has contravened an indivisible obligation, is personally liable for the whole of the penalty, we must for the same reason decide, that when the contravention is made by several heirs, each of them is liable to the penalty in solido; for the contravention of his co-heirs does not lessen his, *nec qui peccavit, ex eo relevari debet, quod peccati consortem habuit; multitudo peccantium non exonerat, sed potius aggravat. Dumoulin, ibid. p. 3. n. 148.*

[358] All that we have said in this paragraph with respect to the heirs of the debtor of an indivisible debt, applies to several principal debtors who have contracted together, without solidity, an indivisible obligation under a penalty; the contravention by one of the debtors obliges the others to the payment of the penalty, each for his respective part, saving their recourse, and it obliges the person contravening for the whole; and when the contravention has been made by several, it obliges them in solido.

§ II. *Decision of the Question with respect to Divisible Obligations.*

[359] When the primary obligation contracted under a penal clause is the obligation of a divisible act, *Cato*, in the passage above cited, seems to decide that the heir who contravenes the obligation, only incurs the penalty as to the part for which he is heir; *si de eo cautum sit quod divisionem recipiat, veluti amplius non agi eum heredem qui adversus ea facit, pro portione sua solum pœnam committere.*

The case mentioned in the law itself is an illustration of this subject: a person engages under the penalty of 300 livres, to acquiesce in the sentence of an arbitrator who had disallowed a demand, by which he alledged himself to be my creditor for ten measures of corn; one of his heirs, who is so for a fifth part, has, contrary to the faith of this agreement, renewed the contest, and demanded from me his fifth share of the ten measures, which the arbitrator decided I did not owe; he alone incurs the stipulated penalty, and he only incurs it for the fifth part for which he is heir; the reason is that the obligation is divisible, and as the heir could only contravene it in respect of the part for which he is bound, he can only be subject to the penalty to the extent of that part; his co-heirs, who not only have not contravened it, but have satisfied their part of the obligation, by acquiescing in the sentence, cannot be liable to the penalty; the creditor who is satisfied in regard to their parts of the principal obligation, cannot demand their parts of the penalty, as he cannot at the same time have the payment of

the principal obligation and the penalty, as we have seen above n. 342 *et seq.*

The 4th paragraph, *si sortem* of the law 5, d. tit. appears contrary to this decision of *Cato*; it is there decided, that when one of the heirs of the debtor has satisfied the obligation in respect of the part for which he was bound, he notwithstanding incurs the penalty, if his co-heir does not satisfy it in like manner; saving his recourse against the co-heir who caused the penalty to be incurred, in not satisfying his part of the obligation, *si sortem promiseris et si ea soluta non esset, pœnam, etiam si unus ex heredibus tuis portionem suam ex sorte solverit, nihilominus pœnam committet donec portio coheredis solvatur. Sed a coherede ei satisfieri debet; nec enim aliud in his stipulationibus sine injuria stipulatoris constitui potest.*

Interpreters, both ancient and modern, have endeavoured to reconcile these two texts; *Dumoulin* adduces different conciliations of the ancient interpreters, all of which he refutes.

We adhere to those of *Cujas* and of *Dumoulin*, *tr. de divid. & individ. p. 1. n. 62. & seq.* which should be taken together, and according to which,—when the obligation is divisible, *tam solutione quam obligatione*, when the intention of the parties, in adding the penal clause, was simply to assure the performance of the obligation, and not to prevent the payment from being made in parts by the different heirs of the debtor, particularly when the act, which constitutes the object of the primary obligation, is such, that the different heirs of the debtor cannot accomplish it otherwise, than each for his own hereditary part,—in this case the decision of *Cato* ought to prevail; the heir of the debtor who contravenes the obligation, should alone incur the penalty, and that only for the part for which he is heir; the act adduced in the instance of § *Cato*, *amplius non agi*, is one of those which is divisible, *tam solutione, quam obligatione*, and which in the nature of things cannot be accomplished by the different heirs of the person who contracted the engagement, except for the part of which each is heir: for, as each of the heirs only succeeds to his own part of the right and of the pretension which the deceased engages not to exercise, each of the heirs can only contravene or execute this engagement, by renewing, or not renewing this pretension with respect of the part which belongs to himself.

On the contrary, when the obligation is divisible indeed, *quoad obligationem*, but indivisible *quoad solutionem*, and the intention of the parties, in adding the penal clause, was, that the payment should only be made by the whole, and not by parts; in this case each of the heirs, by satisfying his part of the primary obligation, will not

not avoid incurring the penalty; and the *§ si sortem* should be restricted to this case which reconciles it with the *§ Cato*.

Dumoulin, p. 1. n. 72, gives as an example of the decision of *§ si sortem*, the case of a merchant who has stipulated with his debtor a certain sum of money by way of penalty, in case the principal sum due to him be not remitted to him in a certain place at the time of a certain fair; the offers which one of the heirs should make to remit his part should not prevent the penalty from being due for the whole, in default of offering the whole; for as the merchant can only transact his business at the fair, with the whole of the sum which is due to him, the intention of the parties in stipulating the penalty was, that it should be incurred for the whole, in default of payment of the whole sum due, notwithstanding the partial payment which might be made; for this partial payment cannot repair, even in part, the injury which the creditor suffers from the delay in paying the remainder, and it is for the reparation of this injury that the penalty was stipulated. Observe, also, that in the instance of *§ si sortem*, the penalty is stipulated for the delay of the performance; therefore the creditor ought to receive both the principal and the penalty.

The law 85. § 6. *d. tit.* likewise relates to the case of an obligation divisible, *quoad obligationem*, but indivisible, *quoad solutionem*; it is said in the case of this stipulation, *si fundus Titianus datus non erit, centum dari; nisi totus detur, poena committitur centum, nec prodest partes fundi dare cessante uno, quemadmodum nec prodest ad liberandum pignus, partes creditori solvere*; although the obligation of giving *fundum Titianum* be an obligation divisible *quoad obligationem*, nevertheless this obligation, whether it arises from a contract of sale, from a contract of exchange, a transaction, or from any other cause, is indivisible *quoad solutionem*, the creditor having an interest not to have the farm in part, and having intended only to have the whole of it; therefore, if one of the heirs of the debtor is *en demeure* with respect to giving his part of this estate, the offers of the others to give theirs, and even their cession of them to the creditor, who only accepted those parts but in the expectation of a cession of the remainder, would not prevent the creditor from demanding the whole of the penalty, offering, however, to give up all claim to the portions of the estate which he may have received, for he cannot have both the one and the other.

[360] In the case of *§ si sortem*, when one of the heirs of the debtor, by not satisfying the primary obligation for the part for which he was liable, has caused the penalty to be in-

incurred against the others, who were ready to satisfy their parts, does he himself incur the whole of the penalty? He does not incur it directly, except for the part for which he is heir; for as he is only subject to the primary obligation for this part, he could not himself have contravened it, except for this part; he can only then incur this part of the penalty, which ought to be proportionate to the contravention; in this respect divisible differ from indivisible obligations; but although he be not directly bound for more than his own part of the penalty, he is indirectly bound for the whole; for his co-heirs, who were ready to accomplish the obligation for their part, having incurred the penalty by the default of this heir in satisfying his, he is bound *judicio familiae erciscundae* to acquit them of it, *d. § si sortem*, and to avoid a useless circuitry of actions, the creditor may demand the penalty from him not only for the part for which he is bound directly, but also for those of his co-heirs, from which he is bound to exonerate them, and consequently for the whole.

We have hitherto spoken of the case in which the heir in part has failed to satisfy a divisible obligation of the deceased, for the part to which he was liable; the instance of § *Cato* and that of § *si sortem*, although different from one another, as we have observed, are both referable to this case; we may suppose another case, respecting which we have no text of law; it is a case in which one of the heirs of the person who has contracted a divisible obligation, with a penalty for its infraction, should contravene this obligation of the deceased for the whole, and not for the part only for which he is heir.

For instance, a person has let his estate to another, and leaves four heirs, one of whom has evicted the tenant from the whole; two questions may be proposed in this case; the first, whether the penalty is incurred by this heir for the whole? the second, if it is incurred, not only against him, but against his co-heirs for their hereditary parts? The reason for doubting upon these two questions is, that as this heir is only bound as heir for the part for which he is heir, he should be looked upon as a stranger as to the other parts; his molestation of the tenant is only in his character of heir, so far as regards his own part, and it is the molestation of a stranger as to the rest; whence it is concluded, that as the molestation of a stranger without right to the enjoyment of the tenant, cannot induce the penalty either against such stranger who would be only liable to damages, nor against the heirs of the person granting the lease, who would only be bound to remit the rent to the tenant, in proportion as his enjoyment has been lessened, in case of the insolvency of the person who caused the molestation; so, in this case, the
penalty

penalty ought not to be incurred by this heir, except for the part for which he is heir; he ought only to be liable to damages for the remainder, and the penalty ought not to attach against his co-heirs: *Dumoulin*, however, who treats upon these questions, p. 3. n. 412, & seq. decides that in this instance, the whole of the penalty is incurred by this heir; and that it is even incurred by his co-heirs, for the part for which each is heir. To establish his decision, and at the same time to refute the reasoning that we have just stated, he distinguishes in this obligation of the lease, and in all other divisible obligations, two kinds of obligations; the principal obligation, which in this case, is that of the lease, and which is divisible; and the accessory obligation, which is the obligation of good faith, and which is indivisible, and for which consequently each heir is bound for the whole. The particular heir of the lessor, who evicts the tenant, was not, in truth, subject to the principal obligation, except for his part; but he was liable for the whole and indivisibly, as to the preservation of good faith. This good faith obliged him not to molest the tenant, not only as to his own part, but even as to the others; in expelling the tenant from the whole of the enjoyment, he ought not then to be considered as having simply trespassed as a stranger, with respect to the other parts, but as having contravened the obligation of good faith, for which he was bound as heir, even with regard to the other parts; this contravention therefore, being a contravention even with regard to the other parts, and consequently to the whole, of an hereditary obligation contracted by the deceased, under the penalty contained in the agreement, it ought to make the heir who contravened the obligation incur the whole of the penalty: such is the decision of *Dumoulin* upon the first question. He confirms this decision by the following reasoning: if it were true, says he, that this heir, in wholly evicting the tenant, ought only to be considered as having contravened the obligation as to his own part, and ought only to be considered as having trespassed as a stranger in respect to the other parts, it would follow, that the tenant would not have, by reason of the contravention of these parts, an hypothecation upon the goods of the deceased, resulting from his lease; it would follow that though the lease had passed under an official seal, such as that of the Chatelet of *Orleans*, the tenant could not proceed against the heir who had evicted him, before the bailli of *Orleans*, except for the part for which he is heir: now, this is what no body will contend; then this heir in part, by evicting the tenant, should be considered as having contravened an hereditary obligation, not only as to his own part, but also as to the other parts, and for the whole; and consequently he ought to

incur the whole of the penalty agreed upon, in case of contravention.

With regard to the second question, *Dumoulin*, for the same reason, decides that the penalty is incurred, not only against this heir, but against each of his co-heirs, for the part for which they are heirs; for by the penal clause the deceased obliges himself and all his heirs to the payment of the penalty, in case of the contravention of the primary obligation; if then there has been a contravention, it may be said, that the condition under which this obligation of the penalty was contracted has existed; and consequently that all the heirs of the deceased are liable to it.

If the deceased had given sureties *in omnem causam*, then, the obligation of the sureties would extend as well to the primary obligation, as to the penal; the act of the heir, who has expelled the tenant, would have obliged the sureties to the performance of the penalty; *à multo fortiori*, it ought to oblige his co-heirs who succeed to this obligation as principal debtors.

[362] This decision of the second question applies even where the heir who has evicted the tenant was, alone, liable to the primary obligation of the lease; as in the following instance: I let an estate which has descended from my father to a tenant, under the penalty of 200 livres, in case I fail in giving him the enjoyment of it; I leave one heir of this paternal property and several heirs of another line to my other possessions; this paternal heir, by his own act, hinders the tenant from having the enjoyment; as by selling the estate without charging the purchaser with the lease: although he alone was bound for the primary obligation of the lease, according to the principles above laid down, *n.* 301, it being the obligation of a specific thing, to which he alone has succeeded; nevertheless his contravention of this obligation will cause all the heirs to incur the penalty for the part for which each is heir; for the debt of the penalty is the debt of a sum of money contracted by the deceased, under the condition of the contravention, to which debt consequently all the heirs of the deceased succeed; but they have recourse against him who made the contravention. *Dumoulin*, *p.* 3. *n.* 430.

[363] Another instance may be given: a person makes a lease of a farm of which he is only entitled to the usufruct, concealing the nature of his title, and giving himself out as the proprietor; there is a penalty of 200 livres, stipulated in favour of the tenant, in case the lessor fails in securing him the enjoyment; the lessor leaves four heirs, one of whom is proprietor of the estate, who in his quality of proprietor evicts the tenant: the penalty is incurred

incurred by all the heirs; but the heir that evicted him is only liable for his own part, and is not obliged, as in the foregoing instance, to indemnify the others: for, having in his quality of proprietor the right of enjoying his estate, he has not transgressed against good faith, *dolo non facit, qui jure suo utitur*; he is only bound for the non-performance of the lease, and liable to the penalty in his quality of heir, and consequently only for his own hereditary part. *Dumoulin, ibid. N°. 432.*

ARTICLE V.

Whether the whole of the Penalty is incurred in favour of all the Heirs of the Creditor, by a Contravention affecting only one of them.

[364] *Paulus* in the law 2. § *Fin. de verb. Oblig.* decides this question in the case of a penal stipulation, attached to a primary indivisible obligation: as for instance, you are obliged by a transaction in my favour to let me and my heirs pass through your park, either on foot or on horse-back, and with beasts of burthen, under a penalty of twelve livres in case you contravene your obligation; I leave four heirs, you have prevented one of the four heirs from entering the park, and have allowed the three others to do so; *Paulus* decides that, in this case, as the contravention is of an obligation which is indivisible and not susceptible of parts, it cannot be a partial contravention; and that the penalty would also appear, according to the subtilty of the law, to be incurred to the whole extent, and for the advantage of all the heirs; nevertheless, that according to equity, which ought in these cases to prevail over subtilty, the penalty should only be incurred, in favour of the heir who has been refused admittance, and for his hereditary part only: *si stipulator decefferit, qui stipulatus erat, sibi heredique suo agere licere, et unus ex heredibus ejus prohibeatur: si pena sit adjecta, in solidum committetur, sed qui non sunt prohibiti, doli [mali] exceptione summovebuntur. d. §.* The reason is, that equity does not permit that the three heirs, to whom the debtor has granted an entrance into his park, should at the same time receive the whole fruit of the performance of the obligation, and the penalty stipulated in case of the non-performance, nor allow them to complain of the contravention of the obligation, which the debtor has made against their co-heir, with regard to which contravention they have not any interest: “*non debet aliquis habere simul implementum obligationis, et penam contraventionis; et pena que subrogatur, loco ejus quod interest, non debet committi his, qui non sunt prohibiti, et quorum nulla interest co-heredem ipsorum esse prohibitum.*”

bibitum." *Dumoulin*, p. 1. n. 32. & 35. The law 3. § 1. d. tit. (a) seems to be contrary; the answer is, that *Ulpian* only speaks according to the subtilty of law.

As the contravention of the obligation against one of the heirs only induces a right to the penalty in favour of such heir, and to the extent of his hereditary part, where the primary obligation is indivisible, the same ought to be decided *à fortiori*, where it is divisible.

CHAP. VI.

Of the Accessary Obligations of Sureties, (b) and others who accede to the Obligation of a Principal Debtor.

This chapter is divided into eight sections, the first seven concern the Obligations of Sureties. We shall treat in the first, of the Obligation of Sureties; we shall see in the second, what are the different kinds of Sureties; in the third, we shall treat of the Qualities which Sureties ought to have; we shall see in the fourth, for whom, in whose favour, for what kind of Obligation, and in what manner the engagements of Sureties are contracted; in the fifth, to what they extend; in the sixth, we shall treat of the manner in which such Obligations are extinguished, and of the different exceptions which the law allows to Sureties; in the seventh, of the actions which the Surety (*caution*) has, on his own account, (*de son chef*) against the principal debtor, and those engaging on his behalf (*ses fidejusseurs*); the eighth, and last section, treats of the other kinds of accessary Obligations.

SECTION I.

Of the nature of the Obligation of a Surety: Definition of Sureties (cautions or fidejusseurs), and the Corollaries deduced from it.

[365] The engagement of a surety is a contract, by which a person obliges himself on behalf of a debtor to a creditor, for the payment of the whole, or part of what is due from such debtor, and by way of accession (c) to his obligation.

(a) *Ubi unus ex heredibus prohibetur, non potest coheres ex stipulatu agere, cujus nihil interest, nisi poena subjecta sit, nam poena subjecta efficit, ut omnibus committatur.*

(b) There is in many respects a conformity between the *Roman* law as adopted in *France*, and the law of *England* with respect to the obligations of sureties; but the former was a more positive system, and included several distinctions and provisions to which we have nothing similar. The decisions in the *English* courts upon this subject, are, so far as it appeared necessary, included in the Appendix, on joint and several Obligations.

(c) The term *caution* or *fidejussor*, appears from the whole of this discussion to import a secondary engagement, that another primary engagement shall be performed, and many of the following corollaries seem to proceed upon an engagement made in a certain form, which, from its general character and effects, has the consequences stated; but I conceive it is not designed to state that several of the engagements which are mentioned, as not being susceptible of being contracted by sureties, cannot be substantially contracted by one person for another in a different form.

The person who contracts such obligation, is called a surety, (*caution or fidejussor*).

The engagement, besides the contract which intervenes between the surety and the creditor, in whose favour the surety obliges himself, includes sometimes another contract, which is supposed to intervene, at least tacitly, between the surety and the debtor for whom he is engaged, and this is the contract of Mandate, which is always supposed to intervene, when the surety engages with the knowledge and consent of the principal debtor; according to this rule of law, *semper qui non prohibet pro se intervenire, mandare creditur* l. 60. ff. de R. J. When the engagement is made without the knowledge of the debtor, it cannot be supposed to include any contract between the surety and the debtor, but there is supposed to intervene between them in this case, that kind of quasi-contract which is called *negotiorum gestorum*. We shall treat of the obligations which arise from this contract of mandate, or from the quasi-contract *negotiorum gestorum*, in the seventh section of this chapter.

The contract which intervenes between the surety and the creditor, in whose favour the surety is obliged, is not of the class of contracts of beneficence, for the creditor by this contract receives nothing more than is due to him; he only procures a security for what is due to him, without which he would not have contracted with the principal debtor, or would not have allowed him time; but the engagement includes a benefit with regard to the debtor, for whom the surety is engaged.

Several Corollaries are deducible from the definition, which we have given of the obligation of a Surety.

First Corollary.

[366] As the obligation of sureties is, according to our definition, an obligation accessory to that of a principal debtor, it follows that it is of the essence of this obligation, that there should be a valid obligation of a principal debtor; consequently, if the principal is not obliged, neither is the surety, as there can be no accessory without a principal obligation, according to the rule of law, *cum causa principalis non consistit, ne ea quidem qua sequuntur, locum habent*. l. 178. ff. de Reg. Jur.

Second Corollary.

[367] A second consequence of our definition is, that the surety does not, by becoming such, discharge the obligation of the principal, but contracts another which is accessory to it;

it; in this he differs from an ex-promissor, whose promise is accepted in lieu and exoneration of that of the person originally liable,

Third Corollary.

[368] It results from our definition, that the surety can only bind himself to the performance of the same thing, or a part of the same thing, with his principal; therefore, if a person became surety for one hundred quarters of corn, in favour of another who owed 100*l.* this would be void, *l. 42. ff. de Fidejuss. Quia in aliam rem, quam quæ credita est, fidejussor obligari non potest; quia, non ut æstimatio rerum, quæ mercis numero habentur, in pecuniâ numeratâ fieri potest: ita pecunia quoque merci æstimanda est.*

But a surety may, *vice versâ*, engage for a sum of money in lieu of another thing: for, money being the common measure of appreciation, the person who owes me one hundred measures of corn, of the value of one hundred pounds, owes me that sum effectively and really; and consequently the person who engages for him in my favour, to pay me 100*l.* does not engage himself to any thing different from what my principal debtor owes me.

[369] If a principal was obliged to give me an estate, and a surety engages for the usufruct, would this engagement be valid? Yes; for the usufruct being a right in this estate is, in a certain sense, a part of the estate owing to me; and consequently it cannot be said, that the surety, by so doing, would be obliged to any thing different from what is due from the principal: *Gaius* decides this in the law 70, § 2. *de Fidejuss.* “*In eo,*” says he, “*videtur dubitatio esse, usufructus pars rei sit, an proprium quiddam? sed cum usufructus fundi jus est, incivile est fidejussorem ex sua promissione non teneri.*”

Fourth Corollary.

[370] It results from this definition, that the surety cannot oblige himself to more than the principal; and that not only in respect of quantity, but also *die, loco, conditione, modo*; therefore the surety cannot oblige himself to harder conditions than the principal, but he may oblige himself to conditions less hard. The law 8. § 7. *ff. de Fidejuss.* decides this, “*Illud commune est in universis, qui pro aliis obligantur, quod si fuerint in duriores causam adhibiti, placuit eos omnino non obligari; in leviores plane causam accipi possunt.*”

From

From this principle it follows, that if a person becomes surety for a determinate sum, as 300*l.* on behalf of a debtor whose debt is not yet liquidated, the mention of that sum should be considered as having been made in favour of the surety, and to the intent only, that if the debt should be liquidated at a greater sum, the surety should only be answerable for 300*l.* But if, by the liquidation, the sum was reduced to 250*l.* the surety would only be obliged for the sum actually due, and in case of paying more, would be entitled to repetition.

Can the creditor in this case, before the liquidation of the debt, oblige the surety to the payment of 300*l.* provisionally, notwithstanding he requires a liquidation of the debt, which he maintains does not amount to so great a sum? The *Coutume* of *Brittany*, art. 189, decides in the affirmative; but this decision ought not to be followed out of its territory; for, according to the principle laid down, as the surety cannot be bound for more than the principal, he ought not to be compelled to the payment of the debt, sooner than the principal, who is not liable to it till after liquidation. *Ord. de 1661, tit. 33. art. 2*, the surety ought not to be compelled to pay before. *D'Argentré*, in his note upon the article of the *Coutume* above cited, agrees that its disposition is contrary to general law, *contra Jus Romanum*; and in his commentary upon art. 206, of the *Ancient Coutume* whence this is derived, he says: *Hic se auctores consuetudinis produnt non Jurisconsultos.*

[371] According to this principle, when the principal is obliged purely and simply, the surety may oblige himself to pay within a certain term, or under a certain condition; but on the contrary, if the principal debtor is only obliged under a certain condition which is yet in suspense, or within a certain term which is not yet expired, the surety cannot oblige himself to pay for him immediately, and upon the first requisition of the creditor. *Dict. Leg. 8. §. 7.*

Observe, that if the engagement does not express any thing upon the subject, the term or condition expressed in the principal obligation, ought to be understood; as it is decided in the law 61. (a) *ff. d. tit.* that the place of payment, expressed in the principal obligation, is understood in the engagement of the surety.

[372] If the principal debtor is obliged to pay within a certain term, the surety may be obliged to pay within the same term, or a longer, but not within a shorter,

(a) Si (ut proponitur) cum pecunia mutus daretur, ita convenit, ut in Italia solveretur; intelligendum, mandatore quoque simili modo contraxisse.

Hence it follows, that when the principal debtor is obliged to pay within a certain term, if the surety obliges himself under a certain condition, to pay as soon as the condition be accomplished, this engagement will not be valid, if the condition be accomplished before the term, within which the principal debtor ought to pay, be expired, *l. 16. (a) § 5. ff. d. tit.* for if the engagement was valid, the surety would be obliged to pay before the debt could be demanded from the principal debtor, and consequently, *in duriores causam*, which cannot be.

When the principal debtor is obliged under a condition, the surety may obligate himself under the same condition, and under another conjointly; for, in this case, the situation of the surety is better than that of the debtor, since he cannot be obliged, unless the two conditions are accomplished; if the surety obliges himself under the alternative of the condition, under which the principal debtor is obliged, and of another, or simply under a different condition, the engagement will be valid, if the condition under which the principal debtor is obliged, happens first, but if the other happens first, the engagement of the surety will not be valid, as the surety cannot be obliged before the principal debtor, *l. 70. (b) pp. § 1. ff. de Fidejuss.*

[373] The place of payment may also render the obligation more burthensome; therefore if the surety promised to pay at a place more distant, than that in which the principal debtor ought to pay, the engagement would not be valid, as being made upon a condition more burthensome than the principal obligation, *d. l. 16. (c) § 1 & 2.*

[374] If a person in our colonies engaged to another to give him one or other of two negroes, say *James* or *John*, who were nearly of the same value, would the engagement by which the surety obliged himself for the debtor giving *John* determinate-

(a) Stipulatione in diem concepta, fidejussor, si sub conditione acceptus fuerit, jus ejus in pendentem erit, ut si ante diem conditio impleta fuerit, non obligetur: si concurrent dies et conditio, vel etiam diem conditio secuta fuerit, obligetur.

(b) Sub diversis quoque conditionibus si fuerint interrogati, interest utra eorum prior extiterit. Si reo injuncta, tenebatur etiam fidejussor, cum conditio ejus extiterit, tanquam si statim ab initio reus pure, fidejussor sub conditione, acceptus esset. Ex diverso autem, si fidejussoris conditio prior extiterit, non tenetur; perinde ac si statim ab initio pure acceptus esset, reo sub conditione accepto.

(c) Qui certo loco dari promissit, aliquatenus duriori conditione obligatur, quam si pure interrogatus fuisset; nullo modo enim loco alio, quam in quem promissit, solvere invito stipulatore potest. Quare si reum pure interrogavero, et fidejussorem cum adjectione loci accipero, non obligabitur fidejussor. Sed et si reus Romæ constitutus, Capuæ dari promiserit, fidejussor Ephesi: perinde non obligabitur fidejussor, ac si reus sub conditione promississet, fidejussor autem in diem certam vel pure (promississet).

ly, be valid? The law 54. (a) *ff. de Fidejuss.* decides that it is valid, that the condition of the surety is in this case better than that of the principal debtor, since the surety may be liberated by the death of *John* alone, whereas the principal debtor can only be liberated by the death of both.

Contrà, if the principal debtor was obliged to give *John* determinately, the engagement by which the surety should undertake to give *John* or *James*, would not be valid, not only for the reason which we have mentioned, that this alternative obligation is more extensive than the determinate obligation of *John*, but also for another reason, which is, that if the surety chose to give *James*, he would give a different thing from that due from the principal debtor, who is only debtor for *John*; which cannot be, *suprà*, n. 368. This is the decision of the law 8. (b) § 8. *ff. de tit.*

This is not to be apprehended in the preceeding instance, in which the principal debtor promised *John* or *James*, and the surety *John* determinately; for in this case if the principal debtor offers *James* to the creditor, and by this choice reduces his obligation to the determinate obligation of giving *James*, he liberates himself from the obligation of giving *John*, and consequently liberates his surety from it; *nam reo liberato, liberantur fidejussores*. The surety who had only acceded to the obligation of giving *John*, no longer owes any thing; if on the contrary, the principal had offered *John*, he would owe the same thing as his surety; it cannot then happen in this case, that the principal and the surety should owe different things.

If the principal was obliged to give the creditor the one of the negroes, *James* or *John*, at the choice of the creditor, the surety may effectually oblige himself to give one of the two at his own choice, *d. l. 8. (c)*, § 10. for the creditor always preserving his choice against the principal, until payment, the debtor will always continue debtor of one of the two things, and, consequently, of that which the surety pleases.

[375] It is a question, whether the surety's engagement is entirely null, when he is obliged to more than the prin-

(a) This law does not relate to the subject, the translator has not been able to find the law intended to be referred to.

(b) Si quis Stichum stipulatus (fuerit) fidejussorem ita acceperit, Stichum aut decem fideiussoribus jubet? Non obligari fidejussorem, Julianus ait, quia durior ejus sit conditio: utpote cum futurus sit, ut mortuo Sticho teneatur. Marcellus autem notat, non ideo tantum non obligari, quia in duriorum conditionem acceptus est, sed quia (&) in aliam potius obligationem acceptus est; denique pro eo qui decem promiserit, non poterit fidejussor ita accipi ut decem aut Stichum promittat, quamvis eo casu non sit ejus durior conditio.

(c) Contra autem, si is qui hominem aut decem, utrum ipse stipulator velit, stipulatus est; recte fidejussorem ita accipiet decem aut hominem utrum tu voles? sit enim (inquit) hoc modo fidejussoris conditio melior.

principal, or whether it is only null so far as it exceeds the principal obligation? It appears that the *Roman* jurists thought it entirely null, although *Dumoulin*, *ad l. 51. si stipulanti*, § *sed si mihi*, no. 30, & *seq.* wished to make them say the contrary; this evidently results from the terms of the law 8. § 7. above cited, *placuit omnia non obligari*. It is true, that *Haloander*, in his edition, reads, *non omnino*; but it is by his own authority that he has changed the reading, contrary to the credit of the copies, and that of the *Grecian* interpreters, who have translated the terms *omnino non*, by ἰδὲν ἄλλως that is, *nullo modo*; this results in like manner from the other texts above cited. The reason which *Conanus* adduces, *Comment. Jur. n. 68*, for the opinion of the *Roman* jurists is, that a surety's engagement being essentially accessory to the obligation of the principal, and it being the essence of an accessory obligation, not to contain any thing more than the principal, an engagement by which the surety obliges himself for any thing more, fails in the essential form of such an engagement, and should consequently be absolutely void. This reasoning, upon which the *Roman* jurists seem to have founded their opinions, is more subtle than solid. From the proposition that a surety's engagement is accessory to the principal obligation, it only follows, that when the surety engages for more, his obligation is not valid as to the excess, but there is no reason why it should not be so to the extent of the obligation of the principal debtor; for, in consenting to oblige himself to a greater sum, he consents to oblige himself to the same sum with his principal; therefore, as the *Roman* laws are not followed in our provinces, except inasmuch as they are conformable to natural equity, I think that in this case we ought to deviate from them, and decide that a surety, who obliges himself to a greater sum than that included in the principal obligation, or who obliges himself to pay immediately what the principal only owes at the end of a certain term, or under a certain condition, is under a valid obligation to pay the sum included in the principal obligation, at the term and under the conditions there mentioned. The *Custom* of *Brittany*, art. 118, has followed this opinion, and *Wissembach*, *ad t. de Fid. n. 10*, agrees, that although contrary to the texts of law, it is followed in practice.

[376] The principle which we have established, that the surety cannot oblige himself to conditions harder than those of the principal debtor, *in duriorem causam*, ought to be understood with respect of the thing due, and of the object of the obligation: the surety cannot indeed, owe more than the debtor, *quantitate, die, loco, conditione, modo*: but, with respect of the quality of the lien, he may be more strictly obliged,

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For instance, 1st, according to the principles of the *Roman Law*, the surety who accedes to an obligation purely natural, is more strictly obliged than the principal, since he may be forced to pay, though the principal cannot, as the creditor has no action against him.

2d, According to the same principles, when a surety has engaged with a debtor who has what is called *exceptionem competentie*; as when a person has engaged as surety for the father, in favour of the son who is his creditor, the surety is more strictly obliged than the principal, since the surety may be forced to the payment of the whole debt; whereas the principal cannot be so, except to the extent of what remains for him, after leaving him what would be necessary for his subsistence, *l. 173. (a) ff de Reg. Jur.*

3d, The surety of a minor is often more strictly obliged than the principal, who may, if the contract is injurious, be relieved against his obligation, whereas the surety is obliged without the hopes of restitution, *l. 13. (b) de Minor. l. 1. (c) Cod. de Fidej. Minor.*

4th, According to our usages, a judiciary surety may be subject to imprisonment, in some cases where the principal cannot, as, where the latter is a priest, a minor, a woman, a person of the age of 70; and consequently more strictly, and, in respect of the quality of the lien, more extensively obliged.

Fifth Corollary.

[377] It results from the definition of a surety's engagement, as being accessory to a principal obligation, that the extinction of the principal obligation necessarily induces that of the surety; it being of the nature of an accessory obligation, that it

(a) In condemnatione personarum, quæ in id, quod facere possunt, damnantur; non totum, quod habent, extorquendum est, sed et ipsarum ratio habenda est, ne egeant.

(b) In causæ cognitione versabitur, utrum soli ei succurrendum sit, an etiam his, qui pro eo obligati sunt, ut puta fidejussoribus. Itaque si cum scirem minorem, et ei fidem non habere, tu fidejusseris pro eo; non est æquum, fidejussori in necem meam subveniri; sed potius ipsi deneganda erit mandati actio. In summa, perpendendum erit Prætori, cui potius subveniat, utrum creditori, an fidejussori; nam minor captus neutri tenebitur. Facilius in mandatore dicendum erit, non debere ei subvenire; hic enim velut affirmator fuit & suavor ut cum minore contraheretur. Unde tractari potest: minor in integrum restitutionem utrum adversus creditorem, an et adversus fidejussorem implorare debeat? Et puto tutius, adversus utrumque. Causa enim cognita, et præsentibus adversariis, vel si per contumaciam desint, in integrum restitutiones perpendendæ sunt.

(c) Postquam in integrum ætatis beneficii restitutus es, periculum evictionis emptori, cui prædium ex bonis paternis vendidisti, præstare non cogeris. Sed ea res fidejussores qui pro te interveperunt, excusare non potest. Quare mandati iudicio, si pecuniam solverint, aut condemnati fuerint, convenieris: modo si eo quoque nomine restitutionis auxilio non juvaberis.

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cannot exist without its principal; therefore, wherever the principal is discharged, in whatever manner it may be, not only by actual payment or a compensation, but also by a release, the surety is discharged likewise; for the essence of the obligation being, that the surety is only obliged on behalf of a principal debtor, he therefore is no longer obliged, when there is no longer any principal debtor for whom he is obliged.

[378] In like manner, the surety is discharged by the novation (a) of the debt; for he can no longer be bound for the first debt for which he was a surety, since it no longer subsists, having been extinguished by the novation; neither can he be bound for the new debt into which the first has been converted, since this new debt was not the debt to which he acceded; *novatione legitime perfecta debiti in aliam speciem translati, prioris contractus fidejussores vel mandatores liberatos esse non ambigitur, si modo in sequenti se non obligaverint, l. 4. Cod. de Fidej.*

[379] So when the principal becomes the sole heir, purely and simply, of the creditor, or *vice versa*, when the creditor becomes sole heir, purely and simply, of the principal, or when the same person becomes successively heir of one and the other, the sureties are liberated, because there no longer remains a principal debtor, by reason of the confusion of the qualities of creditor and debtor, which, being united in the same person, destroy each other; as no one can be creditor or debtor of himself,

It would be otherwise if the debtor only became heir of the creditor, subject to the benefit of an inventory, or *vice versa*, for one of the effects of a benefit of inventory, being to prevent the confusion of qualities, and to distinguish the person of the heir from the beneficiary succession, the debtor, who is beneficiary heir to the creditor, remaining always debtor to the beneficiary succession, his sureties are not liberated, for there is a principal debtor.

When the creditor succeeds to his debtor, not by the title of heir, but by the title of universal donatory, or universal legatee, as in all these cases he is not bound for debts indefinitely, but only so far as the value of the goods to which he succeeds, the confusion (b) only takes place to the extent of this concurrence; whence it follows, that the sureties are only discharged to the extent of such concurrence, and if there be not sufficient in the goods, which the debtor has left, wherewith to discharge the whole debt, the sureties are obliged to pay the remainder; but the creditor cannot sue for

(a) A novation is the acceptance of one obligation in satisfaction of another; for the nature of it, see P. III. ch. 2.

(b) As to the extinction of debts by confusion, see P. III. § 5.

it, until he has accounted for the effects of the debtor to whom he has succeeded.

When the debtor becomes heir of the creditor purely and simply indeed, but in part only, or *vice versâ*, as the confusion only takes place for the portion for which he is heir, the sureties are only liberated for this portion.

[380] When the principal debtor is not discharged *pleno jure*, but by some exception, or *fin de non-recevoir*, which he may oppose to the demand of the creditor, can the sureties oppose the same *fin de non recevoir* as the principal? With respect to this question, we must distinguish between exceptions, or *fin de non recevoir*, which are called *exceptiones in personam*, and those that are called *exceptiones in rem*. *Exceptiones in personam* are those founded upon some reason which is personal to the principal debtor; *exceptiones in rem* are so called, because they are not founded upon any reason personal to the principal debtor, but upon the thing itself, that is, upon the nature of the debt.

These exceptions *in rem* may be opposed by sureties, as well as by the principal; *rei autem coherentes exceptiones etiam fidejussoribus competunt*, l. 7. § 1. ff. de Except. and it is of these exceptions that we must understand what is said in the law 19. ff. d. tit. omnes exceptiones, quæ reo competunt, fidejussori quoque, etiam invito reo, competunt.

Such is the exception of fraud or of violence; such are also the exceptions of a judgment, or of the decisory oath (a), d. l. 7. § 1. for these exceptions being founded upon what was decided by the sentence or decisory oath, that the thing was not due, apply to the thing itself, and are not founded upon any reason personal to the principal debtor; and, consequently, are exceptions not *in personam*, but *in rem*; which may be opposed by the sureties, as well as by the principal with whom the question has been decided, or to whom the oath has been offered; *nec obstat regula juris*, that an adjudication or a decisory oath cannot give a right to a third person, who is not a party (b), l. 2. Cod. quib. res jud. non noc. l. 3 (c), § 3. ff. de Jurejur, for this rule ought

(a) For the nature of the decisory oath, see P. III. ch. 3. § 4. Art. I.

(b) *Res inter alios judicata, neque emolumentum offerre his, qui judicio non interfuerunt, neque præjudicium solent irrogare: Ideo nepti tuæ prejudicare non potest, quod adversus coheredes ejus judicatum est, si nihil adversus ipsam statutum est.*

(c) Unde Marcellus scribit, etiam de eo jurari posse, *an prægnans sit mulier vel non sit*; et jurijurando standum. Denique, ait, si de possessione erat questio, servari oportere; si forte quasi prægnans ire in possessionem volebat, et cum ei contradiceretur, vel ipsa juravit *se prægnantem*, vel contra eam juratum est; nam si ipsa ibit in possessionem sine metu contra eam, non ibit, quamvis vere prægnans fuerit, proderitque, inquit Marcellus fieri juranti jusjurandum, ne conveniatur, quasi calumniæ causa ventris nomine

ought not to be understood of those whose right is essentially connected with that of the person who was a party concerned, such as that of sureties with their principal.

When the principal debtor, by a transaction with the creditor upon the legitimacy of the debt, has agreed to pay it, but with an allowance of three years, the exception which this agreement gives against the creditor, if he sues before the term, is likewise an exception *in rem*, for it is founded upon the thing itself: it is founded upon the doubt which was entertained of the legitimacy of the debt, upon which the transaction took place. This exception may consequently be proposed by the sureties, as well as by the principal, though they were not parties to the transaction; hence arises a question, whether the debtor, by a new agreement with the creditor, may, to the prejudice of the sureties, permit the creditor to demand what is due to him before the term specified by the former agreement? *Paulus*, in the law 27 (a), § 2. *ff. de Pact.* decides formally, that he may, (although some interpreters, to reconcile this text with the law, *fin. ff. Dic. Tit.* which decides the contrary, have put the text to the torture to make it say something else.) The reason of the decision of *Paulus* is, that the right which results from the former agreement having been formed by the mere concurrence of the creditor and debtor, without the intervention of the sureties, it may be destroyed by a contrary agreement; *cum quæque eodem modo dissolvantur quo colligata sunt*; on the contrary, *Furius Anthianus* decides, that the new agreement cannot deprive the sureties of the exception which they had acquired by the former, *l. fin. (b) ff. de Pact.* and I think that we must accede to this decision; the reason alleged for that of *Paulus* can only apply where there is no right acquired to a third person. Some interpreters, whose opinions I have elsewhere followed, to reconcile *Furius Anthianus* with *Paulus*, say, that the decision of *Furius* only takes place in the case where the sureties have ratified and accepted the former agreement; but this conciliation is imaginary. It is

possessione, neve vim patiatur in possessione. Sed an iusjurandum eousque præsit, ut post editum partum non quærat, ex eo editus, an non sit, cujus esse dicitur Marcellus tractat? Et ait, veritatem esse quærendam: quia iusjurandum alteri neque prodest, neque nocet, matris igitur iusjurandum partui non proficiet; nec nocebit, si mater detulerit, et juretur ex eo prægnans non esse.

(a) Pactus, ne peteret, postea convenit, ut peteret: prius pactum per posterius elidetur: non quidem ipso jure, sicut tollitur stipulatio per stipulationem; si hoc actum est; quia in stipulationibus jus continetur; in pactis factum versatur; et ideo replicatione exceptio elidetur.

(b) Si reus postquam pactus sit, a se non peti pecuniam (ideoque cepit id pactum fidejussori quoque prodesse) pactus sit, ut a se peti liceat: an utilitas prioris pacti sublata sit fidejussori, quæsitum est? Sed verius est, semel adquisitam fidejussori pacti exceptionem, ulterius [ei] invito extorqueri non posse.

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not said in this law, that the sureties had accepted the former agreement, it cannot even be supposed; for in so doing, *Furius* would have been putting a question upon what could never be made any question at all.

Let us now proceed to exceptions *in personam*:

Exceptions, founded upon the insolvency of the principal debtor, and upon the personal privilege of his property, being exempt from seizure, so far as it is necessary to his subsistence, cannot be taken advantage of by the sureties; as we learn from the law (a) 7. ff. *de Except.* which lays down that the exception which is granted to a debtor, who may be either the father, or mother, husband, or patron, or a partner of the creditor, to be exempt from the seizure of his necessaries, cannot be opposed by the sureties. The reason is evident; the poverty of the principal debtor does not discharge him from his obligation; and if he afterwards is enabled to pay, he is compellable to do so; in the mean time, his obligation remains entire, and is a sufficient foundation for that of his sureties. His poverty does not destroy it, but only suspends the execution of it, by the exemption above-mentioned; but this exception, being founded upon the quality of father or husband, which is personal to himself, cannot be taken advantage of by his sureties.

It is the same with respect to the exception which results from the *cessio bonorum*. Where the principal debtor has made a cession of his goods, and they are not sufficient to discharge him from his debt, he is not liberated from the remainder, l. 1. (b) *Cod. qui Bon. Ced.* and his obligation for the remainder is a sufficient foundation for the obligation of his sureties for such remainder. Nevertheless, until he has acquired new property beyond what is necessary for his subsistence, he may oppose, against the pursuits of the creditor, a *fin de non-recevoir*, resulting from the cession l. 3. (c) *Cod. de Bon. Author. jud. possid.* l. 4. (d) *de Cess. Bon.* it is evident that this *fin. de*

(a) Exceptiones, quæ personæ cujusque coherent, non transeunt ad alios: veluti [ea] quam scius habet exceptionem, quod facere possit: vel parens, patronusve, non competit fidejussori; sic mariti fidejussor post solutum matrimonium datus, in solidum dotis nomine condemnatur.

(b) Qui bonis cesserint, nisi solidum creditor receperit, non sunt liberati.

(c) Ex contractu, qui cessionem rerum antecessit, debitorem contra juris rationem convenies, cum eum æquitas auxilio exceptionis muniat. At tunc demum iterato possis desiderare conventionem, cum tantum postea quæsit, quod Præsidentem ad ejus rei licentiam debeat promovere.

(d) Legis Julæ de bonis cedendis beneficium, constitutionibus Divorum nostrorum Parentum ad provincias porrectum esse, ut cessio bonorum admittatur, notum est; non tamen creditoribus sua auctoritate dividere hæc bona, et jure dominii detinere; sed venditionis remedio, quatenus substantia patitur, indemnitati suæ consulere permissum est. Cum itaque contra juris rationem res jure dominii teneas, ejus, qui bonis cessit, te creditorem dicens: longi temporis præscriptione peritorem submoveri non posse, manifestum est. Quod si non bonis eum cessisse, sed res suas in solidum tibi dedisse monstratur, Præses provinciæ poterit de proprietate tibi accommodare notionem.

non-recevoir is founded upon a reason of favour, which is personal to the debtor, it is *exceptio in personam*, which cannot be opposed by his sureties.

I think it is the same with the exception arising from a contract of *attermoiement*, to which the creditor would have been obliged to accede, by which a discharge is granted to the debtor of a part of his debt, and certain terms for the payment of the remainder; I think that the exception which this contract gives to the principal debtor, ought not to extend to the sureties, and that they may be sued immediately for the payment of the whole debt; for it is evident, that this is an exception *in personam*, which is only granted to the debtor in consideration of his poverty, which is personal to himself; the remission granted by the contract of *attermoiement* not having been granted *animo donandi*, but by necessity, this, as well as the preceding exception, only invalidates the civil obligation; the natural obligation for what remains unpaid continues entire, and serves as a sufficient foundation for the obligation of the sureties. This reason is an answer to that adduced in the first place in support of the contrary opinion, which is, that it is the essence of an engagement that the surety cannot be bound for more than the principal. With respect to the second argument adduced for the contrary opinion, which is, that if the surety does not profit by the contract of *attermoiement*, and may be obliged to pay the whole of the debt, it would happen indirectly that the principal debtor would not profit from it himself, on account of the recourse which the surety, who has paid the whole, would have against him; the answer is, that this will not happen, because the surety who has paid the whole, is, in his quality of creditor of this sum for his indemnity, obliged, as well as the other creditors, to accede to the contract of *attermoiement*; it must however be allowed, that the contrary opinion is authorised by two ancient *arrêts*, cited by *Basnage*, one of the parliament of *Paris*, the other of the parliament of *Normandy*; but I do not think that the decision of these *arrêts* ought to be followed, for the reason above adduced. This decision even appears to be repugnant to the nature of a surety's engagement, which is an act to which a creditor has recourse for his security against the risque of insolvency of the principal debtor. Now, what would become of this security, if the creditor had not the right of demanding from the surety what the insolvency of the principal debtor would oblige him to remit to such principal? Our opinion coincides with the article xiii. of the *Arrêts* of *M. de Lamoignon* upon this title.

When there has been an agreement between a creditor and the principal debtor, by which the creditor, in order to gratify the
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principal debtor, has agreed with him not to demand the payment of the debt; if the creditor afterwards demanded the payment of it from the sureties, they might indeed oppose the exception which results from the agreement; but, according to the ancient *Roman* law, the sureties had this right only because the demand against them would recur against the principal, who was obliged to discharge them from it, *actione contraria mandati aut negotiorum gestorum*; therefore, in the case in which the demand against the sureties would not recur against the principal, as if the sureties had engaged *donandi animo*, with a declaration that they would not reclaim from the principal what they might be obliged to pay for him, the sureties could not, according to the principle of the ancient law, oppose the exception arising from the agreement between the creditor and the principal debtor, because this agreement, and the exception resulting from it, being founded upon the personal consideration of the creditor for the principal debtor, whom he wished to gratify, is an exception *in personam*, which does not belong to the sureties, as we learn from the law 32. ff. de pact. where it is said, “ *Quod dictum est, si cum reo pactum sit ut non petatur, fidejussori quoque competere, exceptionem, propter rei personam placuit, ne mandati judicio conveniatur; igitur si mandati actio nulla sit, forte si donandi animo fidejusserit, dicendum est non prodesse exceptionem fidejussori.*”

Even when the surety is an ordinary one, who has recourse against the principal debtor for what he is obliged to pay for him, he could not, according to the principles of the *Roman* law, oppose the exception arising from the agreement between the creditor and principal debtor, if by this agreement not to demand the payment of the debt from the principal debtor, the creditor had expressly reserved the power of demanding it from the surety. “ *Debitoris conventio fidejussoribus proficiet, nisi hoc actum est, ut duntaxat, a reo non petatur, a fidejussore petatur: tunc enim fidejussor exceptione non utetur.*” L. 21. § 5. in fin. 22. ff. d. tit.

Cujas, in his commentary upon the said § 5, properly observes, that in this respect sureties would differ from those who are called in law, *mandatores pecuniæ credendæ*: for, if at your request I had lent a person a sum of money, I could not afterwards, by agreeing with the debtor that I would not demand the payment of the debt from him, legally reserve to myself the power of demanding it from you; he gives us a reason for the difference; when at your request I have lent some one a sum of money, I am, by the nature of the contract of mandate, obliged to cede to you my action upon the loan; every person undertaking a commission being obliged *actione mandati directæ*, to render an account to the person giving it of all

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that he has acquired in the execution of the mandate; therefore, when by my own act I have disabled myself from fulfilling my obligation to you, and from ceding to you the action upon the loan, whether by agreeing with him not to demand any thing from him, or by letting him be discharged by my fault from the demand, or in any other manner, I ought not to be admitted to claim from you *actione mandati contraria*, the sum which I lent to him by your request (a), l. 95. § pen. ff. de Solut. for it is a principle common to all reciprocal contracts, that the party who fails in the performance of his own obligation is not admissible to demand from the other party the performance of his (b).

The case is different with respect to sureties. A creditor, according to the principles of the ancient *Roman* law, as *Cujas* observes, *ad. d. §.* does not contract any obligation in favour of the sureties, to preserve for them his actions against the principal, against whom they have an action in their own right; it is merely for a reason of equity that he cannot refuse the cession of it to the surety after payment; but he is only bound to cede them such as they are; therefore, the agreement with the debtor, by which he has rendered his actions against him inefficacious, does not preclude him from demanding the payment of the debt from the surety.

Such was the ancient law, as *Cujas* observes, *ad. d. § 5*, and which can scarcely prevail since the novel of *Justinian*. *Jure novo*, says *Cujas*, *haud facile procedere potest*: for, *Justinian* having by his *Novel* granted to the sureties the exception of discussion, *beneficium ordinis*, which consists in the right that he gives them, when they are sued by the creditor, to require them to proceed, in the first place, against the principal debtor, it is evident that the creditor can no longer, by agreeing with the debtor not to demand the debt from him, reserve the power of demanding it from the sureties; for he cannot by his act deprive them of the right and exception given to them by the law.

According to the principles of the *French* law, besides this reason deduced from the novel, that a creditor cannot, by agreeing with the debtor not to demand the payment of the debt from him, reserve the power of demanding it from the sureties, there is another not less decisive: it is derived from the difference between the principles of the *Roman* law and ours, with respect to simple pacts.

(a) Si creditor a debitore culpa sua causa reciderit: prope est, ut actione mandati nihil a mandatore consequi debeat: cum ipsius vitio acciderit, ne mandatori possit actionibus cedere.

(b) See the observations upon this subject, Appendix, No. XII.

According to the principles of the *Roman* law, those obligations only which were formed by the mere consent of the parties, could be destroyed by a contrary consent; with respect to all others, when the creditor chose to make a release to the debtor, he could only do it by the formula of an acceptilation; without that, the agreement made with the debtor not to demand the debt from him, was only a simple pact, which could not destroy the obligation of the debtor; for as a simple pact cannot produce a civil obligation, so it cannot destroy one. It is true, that this agreement gave the debtor an exception to exclude the creditor from the demand which he might institute against him, contrary to the faith of the agreement; but the debtor only enjoyed this exception from the equity of the prætor and against the rigour of law; the obligation which he had contracted continued to subsist *ipso jure* in his person, and was a sufficient foundation for preserving that of the sureties who had acceded to it.

It was the same with respect to an agreement by which the creditor, through liberality, granted a certain term to his debtor, who had at first contracted a pure and simple obligation without any term; this agreement was a simple pact, which only gave the debtor an exception, against the demand which the creditor, contrary to the faith of the agreement, had instituted against him before the expiration of the term; but if by the agreement the creditor declared, that he only meant to grant the term to the debtor and not to the sureties, this agreement, according to the principles of ancient law, would not prevent him from proceeding before the term against the sureties, who could not oppose the principle of law, that it is of the nature and essence of their engagement, that the surety should not be obliged to more than the principal, and that he should have the same terms of payment; for the agreement by which the term was granted to the principal, being only a simple pact, could not invalidate or diminish his obligation; it continued to subsist *ipso jure* such as it was when contracted, as a pure and simple obligation, and without any term, and leaves that of the sureties to subsist in like manner. If the debtor is enabled to enjoy the term granted to him by the agreement, it is only by virtue of an exception to which he is entitled, by the equity of the prætor against the rigour of the law, and which being founded only upon a consideration personal to the debtor, does not extend to his sureties.

The principles of the *Roman Law*, upon the effect of simple pacts, do not result from natural law, and are founded entirely upon subtilties, very opposite to the spirit and simplicity of the law of

France. The solemnity of an acceptilation is with us unknown : and any kind of agreement may produce, extinguish, or modify civil obligations. When a creditor has agreed with the debtor not to demand the debt from him, this agreement, according to the simplicity of the *French* law, discharges the debtor *pleno jure* ; therefore the creditor cannot legally reserve a power of demanding the payment from the sureties, the liberation of the debtor necessarily inducing that of the sureties.

So in our law, when after the contract a creditor through liberality grants a certain term of payment to his debtor, he cannot exclude the sureties from such term : for as the agreement has the effect of modifying *pleno jure* the obligation of the debtor, and converting a pure and simple obligation into an obligation with a term of payment, the obligation of the sureties necessarily receives the same modification ; and they have the same term of payment as the principal debtor ; it being the essence of their engagement that the surety should not be obliged to more than the principal.

If the sureties, in the case of a contract of *attermoiement* between the creditor and the debtor, do not enjoy the remission and terms granted to the debtor by the contract, as we have above decided, it is because these only affect the civil obligation ; the natural obligation remains entire, and consequently the debtor himself, if he had wherewith to pay could not, in point of conscience, take advantage of either of them. This natural obligation, as we have before said, is a sufficient foundation for that of the sureties ; but where a creditor, of his own free will, and through liberality, has discharged his debtor, or granted him a term, the debtor is no longer obliged, either naturally or civilly, to pay the sum remitted, or to pay before the term ; neither, consequently, are the sureties.

[381] When the principal debtor obtains a restitution against his obligation by letters of rescision, does the rescision of his obligation induce the rescision of that of the sureties ? We must make the same distinction here that we have done with regard to exceptions : if the restitution is founded upon any real defect of the obligation, as upon fraud, violence, mistake, gross inequality, the rescision of the principal obligation induces that of the sureties ; but if, on the contrary, the restitution is founded upon reasons personal to the principal debtor, as for instance, upon his minority ; the principal only acquires a personal defence against his obligation, which, notwithstanding the rescision, subsists *naturaliter*, and is a subject capable of being acceded to by the obligation

gation of the sureties, as is decided by the law 13. (a) *ff. de Minor*, and very directly by the law 1. (b) *Cod. de Fidejusse Min.*

There is, however, a case in which the rescision of the principal obligation, although merely on account of minority, induces that of the sureties; this is when the principal debtor obliges himself in a quality which the rescision has destroyed, as if he had obliged himself in quality of heir, and obtains a restitution against his acceptance of succession: for, the principal debtor not being obliged on his own account, but in the quality of heir which he no longer has, and which he lost by the rescision of his acceptance of the succession, he is no longer debtor at all, not even *naturaliter*; his obligation attached to the quality which is destroyed no longer subsists; as is decided in the law 89. (c) *ff. de Acquir. Hered.*

[382] The rule which we have established, that the extinction of the principal obligation extinguishes that of the surety, is subject to a kind of exception, in the case where the thing due has perished by the act or default of the surety; in this case, although the obligation of the principal debtor be extinguished by the extinction of the thing which constituted the object of it, the surety remains obliged, as is decided by the law 32. § 5. *de Usur.* "*si fidejussor solus moram fecerit, reus non tenetur, sicuti si Stichum promissum occiderit, sed utilis actio in hunc (fidejussorem) dabitur.*"

This has been established contrary to the principle, which does not permit the obligation of the surety to subsist, after the extinction of the principal obligation, as is indicated by the jurist in stating, that in this case the action against the surety is an *actio utilis*, that is to say, that it is given *contra tenorem juris, ita suadente utilitate et equitate*, by way of damages, and as a punishment for the fault of the surety.

Sixth Corollary.

[383] From the principle that the surety, according to our definition, is one who obliges himself for and accedes to the obligation of another, the Roman jurists deduced this consequence, that whenever the two qualities of principal debtor and surety become united in the same person, which happens when the surety becomes heir to the principal; or, *vice versa*, when the principal becomes heir of the surety, or when a third person becomes heir to both the one and the other; in all these cases the quality of principal destroys that of surety; as a surety is essentially one who is obliged for another, and a

(a) *Vide supra*, n. 376.

(b) *Vide supra*, n. 376.

(c) Si pupillus se hereditate abstineat, succurrendum est et fidejussoribus ab eo datis, si ex hereditario contractu conveniantur.

man cannot be a surety for himself; whence they concluded that in all these cases, the obligation as surety was extinguished, and that the principal obligation remained only. *l. 93. (a) § 2. & Fin. ff. de Solut. l. 5. (b) ff. d. fid. l. 24. (c) Cod. de Fidej.*

Hence they concluded, in these cases, that if the surety had himself given a surety who acceded to his obligation, the obligation of this last surety was extinguished by the extinction of that of the first, which, so far as regarded the second, was a principal obligation. *l. 38. (d) § fin. ff. de Solut.*

According to our usages no regard is paid to this subtilty, and a surety of a surety is not discharged on account of the surety, for whom he has engaged, having become heir of the principal debtor, or *vice versâ*; there is the more reason for this opinion, because the *Roman* jurists were divided upon this question, *d. l. 93. § fin.* Even if we were to decide according to the *Roman Law*, that in this case there would be a confusion of the obligation of the surety, the hypothecations contracted by this surety would continue to subsist; for these are only extinguished by payment and this confusion, which according to the subtilty of law, discharges the surety as such, is not equivalent to a payment, as is decided by the said law 38. § *fin.*

When the surety becomes heir of his co-surety, it is clear that there will be no confusion, and that the two obligations subsist, although united in one and the same person. *L. 21. (e) § 1. ff. de Fidej;* so where one of two principal debtors succeeds to his co-debtor, the two obligations subsist. *L. 5. (f) ff. de tit.*

[384] It must not be concluded from the principle, that it is of the essence of the obligation of sureties to accede to the obligation of a principal debtor, that the obligation of the surety

(a) Sed (et) si reus heredem fidejussorem scripserit, (non) confunditur obligatio: et quasi generale quid retinendum est, ut ubi ei obligationi, quæ sequelæ locum obtinet, principalis accedit, confusa sit obligatio, quotiens dux sint principales, altera alteri potius adjicitur ad actionem, quam confusionem parere. Quid ergo si fidejussor reum heredem scripserit? confunditur obligatio secundum Sabinum sententiam, licet Proculus dissentiat.

(b) Julianus ait, eum, qui heres extitit ei, pro quo intervenerat, liberari ex causa accessionis et solummodo quasi heredem rei teneri.

(c) Fidejussoris quidem heres exemplo rei principalis tenetur, sed si idem utrisque succedat, intercessionis obligatione finita, velut principalis tantum debitoris heres conveniri potest.

(d) Qui pro te apud Titium fidejusserat, pignus in suam obligationem dedit, post idem te heredem instituit quamvis ex fidejussoria causa non teneris, nihilominus tamen pignus obligatum manebit; at si idem alium fidejussorem dederit, atque ita heredem te instituerit; rectius existimari ait, sublata obligatione ejus, pro quo fidejussum sit, eum quoque, qui fidejusserit, liberari.

(e) Non est novum ut fidejussor duabus obligationibus ejusdem pecuniæ nomine teneretur; nam si in diem acceptus, mox pure accipiatur, ex utraque obligatur; et si fidejussor confidejussori heres extiterit, idem erit.

(f) Reum vero reo succedentem ex duabus causis esse obligatum.

is extinguished, when the principal debtor dies without having left any heirs; the reason for doubting would be that there remains no principal debtor, to whose obligation the surety might appear to accede; the reason for deciding, which may at the same time serve as an answer to this objection, is that the succession of the principal debtor although vacant, represents him, and is in place of his person, according to the rule, *hereditas jacens personæ defuncti vicem sustinet*, and consequently there remains at least, *fictione juris*, a principal debtor to whose obligation that of the sureties is accessory.

Vice versa, when the creditor, in whose favour the engagement has been entered into, dies and leaves his succession vacant, this succession represents him, and is a fictitious person in whose favour the engagement continues to subsist.

[385] When the engagement has been entered into in favour of the creditor in a certain quality, the engagement subsists in favour of the person succeeding to this quality. For instance, if I have engaged on behalf of the debtor of a succession in favour of the heir, in his quality of heir, and this heir has since restored the succession to a *fidei-commissary* heir, to whom the quality of heir and all the hereditary rights have passed, the engagement subsists in favour of the *fidei-commissary* heir. L. 21. (a) *de Fid.*

SECTION II.

Of the different Kinds of Sureties.

[386] We have in the *French* law three different kinds of sureties: sureties (cautions) purely conventional; legal; and judiciary.

Conventional sureties are such as intervene by the agreement of the parties in the different contracts, as in contracts of loan, of sale, of letting, and the like: for instance, if a person borrows money and has a surety who obliges himself to the lender to restore the loan, or buys something, or takes a lease, and has a surety who obliges himself for the payment of the price, or rent; these are conventional sureties, not required either by the law or the judge; and the only cause of their intervening is the agreement of the parties.

(a) Heres a debitore hereditario fideiussorem accepit, deinde hereditatem ex Trebelliano restituit: fideiussoris obligationem in suo statu manere ait. Idemque in hac causa servandum, quod servaretur, cum heres, contra quem emancipatus filius bonorum possessionem accepit, fideiussorem accepit. Ideoque in utraque specie transeunt actiones.

Legal sureties are those which the law commands to be given; such as those which a person is bound to give in order to obtain the enjoyment of the property, of which the usufruct has been given or left to him, &c.

Judiciary sureties are those which are ordered by the judge; as when the judge orders that a person shall provisionally receive a sum giving security to refund it, if he is ordered so to do.

S E C T I O N. III.

Of the Qualities which Sureties ought to have.

§ I. *Of the Qualities which a Person ought to have, in order to contract a valid Obligation as Surety.*

[387] It is necessary, in the first place, that the surety be capable of contracting, and obliging himself as such.

All persons who are incapable of contracting, such as idiots, married women, religieux, cannot be sureties.

[388] By the *Roman* law, women could not oblige themselves as sureties for the affairs of others; the *Senatusconsultum Velleianum* destroyed their obligation.

Justinian, by his *Novel*, 134. *Cap.* 8, permitted women, obliging themselves, to renounce the exception which this *Senatusconsultum* gave them.

This law was formerly followed in *France*; but as the clause of renunciation to the *Senatusconsultum Velleianum*, which was become an expression of course in the acts of the notaries, rendered the effect of it useless; and as nothing but litigation could arise from it, it pleased the King, *Henry IV.*, to abrogate entirely this law of the *Senatusconsultum Velleianum* by his edict of 1606, and consequently, it is no longer enforced within the limits of the parliament of *Paris*, where this edict was registered.

In *Normandy* where it has not been registered, the law of *Velleianum* is strictly observed, and the *Novel* which permitted women to renounce it, is not followed.

In this diversity of jurisprudence, the law of the woman's domicil, at the time of her contracting the engagement, is to be followed: for the laws that regulate the obligations of persons, such as the *Velleianum*, are personal statutes which extend to all persons who are subject to them by their domicil, in whatever place their property may be situated, and wherever the contract may be made;—therefore, if a woman, having her domicil in
Normandy,

Normandy, should become surety for another person, although the act of engagement was passed at *Paris*, where the *Velleianum* is abrogated, the engagement will be null.

But though a woman was married in *Normandy*, if her husband has transferred his domicile to *Paris*, the woman having ceased by this change of domicile to be subject to the laws of *Normandy*, the engagements which she may afterwards contract will be valid.

The personal obligation, that a *Norman* woman has contracted in being surety, being void, it follows that the hypothecation of her property will be also void, although the property may be situate at *Paris*, as the hypothecation cannot subsist without the personal obligation, to which it is accessory.

Vice versâ, if a woman resident in *Paris*, should become surety by an act before notaries, her goods, although situate in *Normandy*, will be hypothecated; this hypothecation being a consequence of the obligation, which she has contracted by an authentic act.

Perhaps this objection may be made: It is agreed, it will be said, that the *Velleianum* is a personal statute, in respect of its first part, by which it forbids women to oblige their persons for others; but it has a second part, by which it forbids them also to oblige their goods for the debt of another: and the object of this second part being things and not persons, it is with respect to this second part a real statute, and, according to the nature of real statutes, it governs all things situate in the territory where it is in force, to whatever persons they may belong; therefore it annuls the obligation which a woman, although not personally subject to its operation, makes of her goods situate in *Normandy* for the debt of another.

My answer is, that this argument only proves, that if a *Parisian* woman without being surety, and without obliging herself personally, obliges her property, situate in *Normandy*, for the debt of another, this obligation would be null, because the *Velleianum* observed in *Normandy*, which governs the property there situated, prevents such property from being obliged for the debt of another: but when the obligation of the property is only a consequence of the personal obligation contracted by an act before notaries by a *Parisian* woman, the law of *Normandy* cannot invalidate it; for this law having no authority over the personal obligation of a *Parisian*, cannot have any over what is only the accessory to it.

The *Velleianum* being only a personal statute in respect of the first part, and a real statute in respect of the second, it follows that a *Norman* woman in case she does not become a surety, and does not contract any personal obligation, may oblige the goods which she has situate out of *Normandy*, in a Province where the *Velleianum*

is abrogated, for the debt of another; for real statutes only extend to things situate in the immediate territory.

[389] Minors, though emancipated, cannot contract a valid obligation as sureties for the affairs of others: for the emancipation only gives them the power of administering their own goods; and it is evident that an engagement as surety, for the affairs of another, makes no part of this administration.

This is the case even with respect to a minor merchant, who has engaged as surety for another merchant, respecting a commercial transaction, in which he has no interest; for his quality of merchant does not give him the power of contracting without the hope of restitution, except for the affairs of his business; now, the business of another merchant, in which he has no interest, is not an affair of his commerce. *Basnage, Traité de Hypot. p. 2. c. 2. Despeisses, t. of Sureties, S. t.*

For the same reason, a minor who, by the dispensation of the prince, exercises a public office, is not thereby deprived of the right to restitution against an engagement which he has contracted as surety; for the dispensation of the prince only makes him be regarded as of full age, in respect of what concerns the public charge that he is permitted to enjoy; whence it follows, that those engagements only are contracted without right of restitution, which are relative to the administration of such charge; these principles are certain, notwithstanding a contrary *arrêt* cited by *Despeisses. Ibidem.*

There are some extremely favourable cases, in which the engagement of a minor as surety may be valid. For instance, it has been adjudged that a minor cannot obtain restitution against an engagement which he has entered into, for the purpose of liberating his father from prison.

The engagement of a minor made on this account, ought especially to be confirmed, when the father had not an opportunity of relieving himself from prison by the cession of his goods, and when the engagement would not occasion too serious a damage, and derangement to the fortune of the son; but if the father could have had recourse to the cession of his goods, the minor son, who has had the facility to enter into a considerable engagement for his father, which was not necessary, ought to be relieved; the age of the minor may also be taken into consideration; a person of an age approaching to majority ought to be relieved against such an engagement with less facility, than one who was of a less advanced age. *Basnage* maintains, that to prevent the engagement of a minor on this account being subject to rescission, it is necessary, that at the time of entering into the engagement, he should be at least

least eighteen years of age, which is the age of complete puberty, and that at which by the *Novel*, 115. c. 3. § 13, children were obliged, under penalty of disinherison, to ransom their fathers from captivity ; he cites an *arrêt* which annuls an engagement made for this purpose by a minor of sixteen. In all these cases, regard ought to be paid to the different circumstances ; and hence arises the variety of *arrêts* reported by *Brodeau, sur Louet. L. A. ch. 9.*

§ II. *Of the Qualities requisite for a Person to be received as Surety.*

[390] When a debtor is obliged whether by the law, or by the judge, or by mere agreement, to find a surety to his creditor, the surety to be receivable must not only have this first quality, of being able to oblige himself as such ; it is also necessary, 1st, That he be solvent, and have sufficient property to answer the obligation to which he accedes.

When the creditor to whom the surety is offered disputes his solvency, the surety ought to establish it, by producing the titles of immoveable property which he possesses ; otherwise, he ought to be rejected.

In judging of the solvency of a surety, and the sufficiency of his property to answer for the debt, no regard is commonly paid to moveable property, as that is easily alienated and is not followed by hypothecation ; nevertheless, if the debt is moderate, and the engagement is not to continue long, merchants who have a well established business are admitted, although their fortune consists only in moveables. *Basnage, ibid.*

No regard is paid to property in litigation, or which is situate at too great a distance.

2d, The surety should have a domicil in the place where the engagement is required to be given, that is to say, within the limits of the bailliage, in order that the discussion may not be too difficult. *Fidejussor locuples videtur non tantum ex facultatibus, sed ex conveniendi facilitate. L. 2. ff. Qui satis, &c.* In this respect, however, more indulgence is shewn to those who are obliged by the law, or by the judge to find sureties, than to those who have submitted to it voluntarily ; the latter ought not to be admitted to allege, that they cannot find any within the district, as they have voluntarily submitted to find such sureties, *sibi imputare debent* ; the others should be easily admitted, to offer as sureties persons of their own country, when they cannot procure any in the place where the engagement ought to be given. *Basnage, Despeisses.*

3d, For the same reason, if a powerful person is offered as surety, the creditor may refuse him ; he may also refuse a person, who by his

his right of *committimus*, may transfer the suit of the creditor into another jurisdiction, or a soldier who would be in a condition to obtain letters *d'etat*. *V. Basnage, tr. de Hyp. p. 2. ch. 2.*

There is also another quality, requisite in persons offered as judiciary sureties; that they be subject to arrest: wherefore women, ecclesiastics who are in sacred orders, and persons above seventy years of age, may be refused as judiciary sureties; these persons not being subject to imprisonment for debt.

Concerning the form of the reception of sureties, see the ordinance of 1667, *t. 28.*

§ III. *Of Cases in which a Debtor is bound to find a new Surety in the place of one before received.*

[391] If the surety had the requisite qualities when received as such, but has ceased to have them, as, if he has become insolvent, will the debtor be obliged to find another? We must make a distinction upon this subject: He will be obliged to do so if it is a legal or judiciary surety, *si calamitas insignis fidejussoribus, vel magna inopia decideret, ex integro satisfaciendum erit. L. 10. § 1. Qui satisfd. Cog.*

If it is a conventional surety, we must make a distinction. If I am obliged to find a surety indeterminately, and, in performance of this obligation, I have found one, who has since become insolvent, I shall be bound to find another; but if I contracted at first with a particular surety, or obliged myself to find a particular person as surety, and he afterwards becomes insolvent, I cannot be obliged to find another, because I only promised to procure the surety whom I actually have procured.

[392] It remains to examine the question, Whether the person who is bound to find a surety can be admitted instead thereof, to give sufficient pledges to answer the debt? For the negative, this maxim of law, *aliud pro alio, invito creditore, solvi non potest*, is adduced, which applies even when the thing offered should be better; whence it seems to follow, that the creditor who is intitled to have a surety is not obliged to receive pledges instead; notwithstanding these reasons, there should be some facility in allowing such pledges to be given, when the debtor cannot procure a surety; for the only interest of the creditor is to have security, and there is more security in a pledge than in a personal engagement; because, as the person to whom the surety is to be given, has no other interest but to have security, *cum plus cautionis sit in re quam in persona; et tutius sit pignoris incumbere quam in personam agere*; it would be mere ill-humour to refuse
pledges

pledges in lieu of a surety, if the things which are offered are such as he may keep without any trouble or danger. *Basnage, id.*

S E C T I O N. IV.

On whose Behalf, in favour of whom, for what Obligation, and in what manner the Obligation of a Surety may be contracted.

§ I. On whose Behalf, and in favour of whom.

[393] A person may engage himself as a surety for any debtor whatever, even for a vacant succession, *cum persona vicem sustineat. l. 22. ff. de Fidejuss.* and in favour of any creditor. In like manner a person may engage as surety even for infant children, madmen, or interdicts, in cases where they may contract a valid obligation, without any act of their own: for instance, if I have conducted their affairs with advantage, they are obliged *ex quasi contractu*, to reimburse me what I have expended in doing so, and therefore a person may engage as surety for the performance of this obligation. It is shewn by *Cujas*, that it is in this sense that we are to understand the law 25. *ff. de Fidejuss.* which says, “*si quis pro pupillo sine tutoris auctoritate obligato, prodigove, vel furioso fidejusserit; magis esse ut ei non subveniatur.*”

This explanation removes the contrariety which *Basnage* discovers, between this law and law 6. *ff. de verb. Oblig.* which says, “*is cui bonis interdictum est non potest promittendo obligari, et ideo nec fidejussor pro eo intervenire potest;*” for in the first case the interdict must be supposed to be under a valid obligation; whereas in the latter, he is under no obligation, being incapable of contracting; and therefore the obligation of the surety is void, for want of a principal obligation, *supra n. 366.* *Gaius* clearly establishes our distinction, in law 70. § 4. *de Fidejuss.* “*Si a furioso,*” says he, “*stipulatus fueris, non posse te fidejussorem accipere, certum est; quod si pro furioso jure obligato, fidejussorem acciperis; tenetur fidejussor.*”

It is evident that a person cannot become surety for or to himself. *L. 21. (a) § 2. ff. d. tit.*

[394] A person can only become surety to the creditor of the person on whose behalf the engagement is made;

(a) *Nec pro se quis fidejubere possit.*

such an engagement to one, who had only the power of receiving the debt, would not be valid. *l. 23 (a) ff. d. tit.*²

§ II. For what Obligation.

[395] A person may engage as surety for any obligation whatever : *fidejussor accipi potest, quoties est aliqua obligatio civilis vel naturalis, cui applicetur. L. 16. § 3. ff. d. tit.*

Observe that the natural obligations, for which it is said in this text that sureties may intervene, are those for which the civil law did not allow any action, such as those which were formed by a simple pact, those contracted by slaves, and those which were not on other accounts reprov'd by the laws; but a surety cannot effectually intervene for obligations reprov'd by the laws, although they may be binding in point of conscience, and may in that sense be called natural Obligations.

It is upon this ground that the laws decide, that a surety cannot make a valid accession to the obligation of a woman, who obliged herself contrary to the prohibition of the *Senatusconsultum Velleianum*, *l. 16. (b) § 1. ff. ad Sen. Vell. l. 14. (c) Cod. d. tit.* for although the woman in point of conscience, is bound to acquit her obligation, yet as the obligation is contracted contrary to the prohibition of the law, it is, in point of law, regarded as null, and consequently cannot serve as a foundation to the obligation of a surety; the law, in annulling the obligation of the woman, annuls every thing that depends upon it, and consequently, the engagements of sureties which are accessory to it; this is the meaning of the terms of the law *l. 16. § 1. quia totam obligationem senatus improbat.*

It appears to me that the same decision should take place, in regard to an engagement which may be entered into for a woman, under the power of her husband, who has contracted an obligation without being authorized; it ought even to be decided *a fortiori*; for the law only annulled, *per exceptionem*, the obligation of a woman who obliged herself contrary to the *Velleianum*; but it may be said, that according to our customary law, the engagement of a woman who has contracted without being authorized, though it

(a) Si mihi aut Titio decem stipulatus fuero, Titius fidejussorem accipere non potest: quia solutionis tantum causa adjectus est.

(b) Si ab ea muliere, quæ contra senatusconsultum intercessisset, fidejussorem accepissem: Gaius Cassius respondit, ita demum fidejussori exceptionem dandam, si a muliere rogatus fuisset. Julianus autem recte putat, fidejussori exceptionem dandam, etiam si mandati actionem adversus mulierem non habeat; quia totam obligationem senatus improbat.

(c) Mulierem contra senatusconsulti Velleiani auctoritatem non posse intercedere, eademque exceptione fidejussorem ejus uti posse, juris auctoritas probat.

may be valid in point of conscience, is void *ipso jure* in point of law, since our customs declare her absolutely incapable of contracting, and obliging herself, *Femme mariée ne se peut obliger, &c. Paris. art. 234: ne peut aucunement contracter, Orleans, art. 194. Domat, tit. Des cautions, § 1. n. 4.* is against our opinion, and *Basnage* cites an *arrêt* of the parliament of *Bourgogne*, reported by *Bouvot*, which adjudged the engagement of a surety on behalf of a woman, who had contracted without being authorized, to be valid; but I do not think that the decision of this *arrêt* ought to be followed: The distinction upon which *Basnage* would found this decision whether the principal obligation is void, *ratione rei in obligationem deductæ*, or *ratione personæ*, does not appear to me to be solid; an obligation, in whatever way it may be void, whether *ratione rei*, or *ratione personæ*, is not a real obligation; and it is of the nature of the engagements of sureties, that they cannot subsist unless there is a principal obligation, *supra. n. 366.* We ought not to compare a woman under the power of her husband to a minor. The obligation of a minor is not void; the right of restitution which the laws allow him against his obligation, supposes an obligation to exist; there is then an obligation to which the surety may accede; but the obligation of a woman under the power of her husband, who contracts without being authorized, is absolutely null; there is no obligation to which the surety can accede.

But if any one should oblige himself conjointly with a woman not authorized, not as surety for her, but as principal debtor, the nullity of the woman's obligation would not induce the nullity of his. For instance, if a sum of money is borrowed by me, and such a woman with an undertaking in solido for the re-payment, she received the money, and expended it, she will not be under any obligation, but I shall be obliged as a borrower and principal debtor; for to render me such, it is not necessary that I should have received the money myself; it is sufficient that it has been delivered to her with my consent.

A surety cannot engage for the performance of obligations, *contra bonas mores*. For instance, if a person employed me to commit a crime and obliged himself to indemnify me from all the consequences of it, and to give me a certain recompence, another could not effectually engage as surety for such an obligation; it is in this sense that it is said *maleficiorum fidejussorem accipi non posse*; but after the act is committed, a person may enter into a valid obligation as surety, for the reparation of the injury. *L. 70. (a) § fin. ff. de Fidejuss.*

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(a) Id quod vulgo dictum est maleficiorum fidejussorem accipi non posse, non sic intelligi

[396] A person may be surety even for the obligation of a personal act, which can only be performed by the principal debtor, *l. 8. § 1. (a) ff. de op. lib.* for this obligation is converted by its non-execution, into an obligation of damages, which the surety may pay and this is sufficient for the validity of the engagement.

[397] The *Roman* law, did not permit a woman to receive a surety from her husband, for the restitution of her dower; this distrust with regard to the person to whom she was trusting, and submitting her person, appeared to the emperors repugnant to propriety, *l. 1 & 2. Cod de Fid. vel. Mand. dot.* These laws are not observed among us.

[398] A person may become surety not only for a principal obligation, but even for the engagement of a surety: *pro fidejussore fidejussorem accipi posse nequaquam dubium est, l. 8. § 12.*

Our certificators of sureties, are a kind of sureties for sureties.

[399] Lastly, a person may become surety not only for an obligation already contracted, but for one to be contracted, in future; *adhiberi fidejussor tam futurae quam praesenti obligationi potest, l. 6. § fin. dic. tit.* so that the obligation resulting from this engagement, shall only begin to arise from the time when the principal obligation is contracted; for it is the essence of such obligation, that it cannot subsist without a principal one. According to these principles, I may agree now to become surety to you for 1000*l.* which you propose to lend hereafter to *Peter*; but the obligation resulting from this engagement will only begin to have effect, from the time when you actually lend the money; as long as you have not yet lent it, and the thing is entire, I may change my intention, giving you notice not to lend the money to *Peter*, and that I no longer intend to be surety for him. *Basnage, tr. de Hyp. p. 2. ch. 6.*

§ III. In what manner the engagements of Sureties are contracted.

[400] According to the *Roman* law, an engagement as surety was only contracted by stipulation; stipulation is not in

telligi debet, ut in pœnam furti, is, cui furtum factum est, fidejussorem accipere non possit; nam pœnas ab malificio solvi, magna ratio suadet; sed ita potius ut qui cum alio, cum quo furtum admisit, in partem, quam ex furto sibi restitui desiderat, fidejussorem obligare non possit; et qui alieno hortatu ad furtum faciendum provectus est ne in furti pœna ab eo, qui hortatus est, fidejussorem accipere possit, in quibus casibus illa ratio impedit fidejussorem obligari; quia scilicet, in nullam rationem adhibetur fidejussor; cum flagitiosae rei societas coita nullam vim habet.

(a) Pro liberto jurante fidejubere quemvis posse placet.

use amongst us ; the engagement may be made by a simple agreement, either by an act before notaries, or under private signature, or even verbally ; but if the object is more than a hundred livres, testimonial proof of a verbal agreement is not admitted.

[401] Although such engagement may be made by letter, or even verbally, nevertheless, great attention must be paid not to regard what a person says or writes as such an engagement, unless the intention of becoming surety be clearly expressed ; therefore if I have told you, or written to you by letter, that a man who wished to borrow money from you was solvent, that cannot be taken for an engagement as surety ; for in this case I might have had no other intention than to intimate to you what I thought, and not to oblige myself. According to these principles, it was decided by an *arrêt* reported by *Papon* X. 4. 12, that these terms in a letter, *such a person wishes to place his son to board with you, he is a man of probity and will pay you properly*, did not amount to any obligation : according to the same principle, if I accompany a person to a tradesman's to buy some cloth, the tradesman should not conclude from that, that I have become surety for such person.

Although a person has entered into payment for another, even for his son, by paying a part of his debt for him, it is not to be concluded that he intended to become surety for the remainder of the debt. *L. 4. (a) Cod. de Uxor pro Marito, &c.*

If it were stated in an obligation, that it was passed in my presence, and that I had subscribed it, it could not be concluded from that, that I had become surety ; I should be considered in this case as having signed only as a witness. *L. 6. (b) Cod. de Fidejuss.*

[402] When the debtor is obliged to give security, either by an agreement or by law, the creditor may demand that the surety shall oblige himself by an act before a notary.

[403] It is of no consequence, whether the engagement of a surety be contracted at the same time as the principal obligation, or at a different time, before or after.

It is not necessary that the person, on whose behalf the security is given, should assent to it. *L. 30. (c) ff. de. tit.*

(a) Cum te ideo ex persona filii tui commemorare conveniri, quod pro debitis ejus aliquando intulisse videaris ; defensionibus tuis uti apud eum, cujus super ea re notio est, minime prohiberis ut is ad solutionem alieni debiti urgeri te non patiatur.

(b) Si pater tuus pro Cornelio cum pecuniam mutuam acceperit, se non obligavit, frustra ex eo quod tabulas obligationis, ut testis signavit, conveniris.

(c) Fidejubare pro alio potest quisque, etiam si promissor ignoret.

SECTION V.

Of the Extent of the Engagements of Sureties.

[404] In order to judge of the extent of the obligation of the surety, great attention must be paid to the terms of the engagement.

When the surety has expressed for what sum, or for what cause he engages his obligation only extends to the sum, or to the cause which is expressed: for instance, if any one has engaged as surety to me for my tenant, for the payment of his rent, he will not be bound for the other obligations of the lease; such as those which result from the want of repairs, &c.

If a person engages as surety for a principal sum, he is not bound for the interest. *L. 68. (a) § 1. ff. dic. tit.*

On the contrary, when the terms of the engagement are general and indefinite, the surety is understood to be obliged for all the obligations of the principal debtor, resulting from the contract to which he has acceded; he is supposed to have engaged *in omnem causam*.

For instance, if the engagement, by which a person has become surety in my favour for my tenant, expresses in general terms, that he has become surety for the lease, he will be bound not only for the payment of the rent, but generally for all the obligations of the lease; as for instance, for the want of repairs, for the restitution of money advanced, or of the moveables which were left to the tenant for the cultivation of the estate, *dotis prediorum. L. 52. (b) § 2. ff. dic. tit.*

A person who engages as surety in these general terms, is also bound not only for the principal due by him, on whose behalf he is obliged, but also for the whole of the interest which may be due. *L. 2. (c) § 11, & 12. ff. de Adm. Rer. ad. Civit. Pertin. l. 54. (d) ff. locat.*
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(a) Pro Aurelio Romulo conductore vectigalis centum annua Petronius Thallus et alii fidejusserant; bona Romuli fiscus ut obligata sibi occupaverat, et conveniebat fidejussores tam in sortem, quam in usuras, qui deprecabantur; lecta subscriptione fidejussionis, quoniam in sola centum annua se obligaverant, non in omnem conductionem: decrevit fidejussores in usuras non teneri; sed quicquid ex bonis fuisset redactum, prius in usuras cedere, reliquum in sortem; et ita in id quod defuisset, fidejussores conveniendos, exemplo pignorum a creditore distractorum.

(b) Fidejussores a colonis datos, etiam ob pecuniam dotis prediorum teneri convenit: sum ea quoque species locationis vinculum ad se trahat, nec mutat confestim, an interjecto tempore fidem suam adstrinxerunt.

(c) Conductore perficiendi operis punito, fidejussor qui pro eo intervenerat idem opus extruendum alii locaverat, nec a secundo redemptore opere perfecto usurarum prestationem heres fidejussoris recusare non debet: cum et prior causa in bonae fidei contractu in universum fidejussorem obligaverit; & posterior locatio, quia suum periculum agnovit, solam prestationi Reipublicae eum substituerit. Qui fidejusserint pro conductore vectigalis in universam conductionem, in usuras quoque (in) jure conveniuntur, nisi proprie quid in persona eorum obligationis expressum est.

(d) Quæro, an fidejussor conductionis, etiam in usuras, non illatarum pensionum nomine

He is bound not only for those which are due *ex rei natura*, but also for those arising from the delay of the principal debtor; *Paulus respondit, si in omnem causam conductionis obligavit, eum quoque exemplo coloni, tardius illatarum per moram coloni pensionum præstare debere usuras, d. l. 54.*

He ought also to be liable for the expences incurred against the principal, for these are an accessory of the debt; but he ought only to be liable for them from the time of the suit being notified to him; this has been established to prevent a surety from being ruined in expences, which are frequently incurred without his knowledge, and which he might avoid by paying, when applied to; therefore, until the suit is notified to him, he ought only to be liable for the first process.

[405] However extensive and general the engagement may be, it only extends to the obligations which arise from the contract itself, for which the surety is obliged, and not to those which might arise from an extrinsic cause.

As for instance, a creditor in our colonies has lent money to some one, and for a greater security, the debtor has given him as a pledge, a negro whom he knew to be a thief, without apprising him of it; the negro robs the creditor to whom he was given in pledge; the creditor may bring an action for damages *contraria pignoratitia actione* against the debtor; but the engagement of the surety does not extend to these damages, which arise from a cause foreign to the loan for which he has engaged; *ea actio fidejussorem onerare non poterit, cum non pro pignore, sed pro pecunia mutua fidem suam obliget. l. 54. ff. de Fidejuss.*

For the same reason, a person who becomes surety for an administrator of the public revenues, is only obliged for the restitution of the public money, and not for the penalties to which the administrator may be condemned for malversation. This was decided by the Emperor Severus: *fidejussores magistratum in pœnam vel mulctam non conveniri debere decrevit. L. 68. ff. dic. tit.* and in general, the engagement does not extend to the penalties to which the debtor has been condemned, *officio judicis, propter suam contumaciam*; for this is a cause extrinsic to the contract; *non debet imputari fidejussoribus, quod ille reus propter suam pœnam præstitit. L. 73. ff. dic. tit. (a).*

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mine teneatur: nec pro sint ei constitutiones quibus cavetur, eos qui pro aliis pecuniam exsolvent, sortis solummodo damnum agnoscere oportere? Paulus respondit, si in omnem causam conductionis etiam fidejussor se obligavit, eum quoque, exemplo coloni pensionum præstare debere usuras: usuræ enim in bonæ fidei judicis et si non tam ex obligatione proficiantur, quam ex officiis judicis applicentur, tamen cum fidejussor in omnem causam se applicuit, sequum videtur ipsum quoque agnoscere onus usurarum, ac si ita fidejussit. QUANTUM ILLUM CONDEMNARI EX BONA FIDE OPPORTEBIT TANTUM FIDE TUA ESSE JUBES? vel ita INDEMNEM ME PRÆSTATES.

(a) In *Stratton v. Russell*, 2 T. R. 366, the defendant engaged as surety with A., for

SECTION VI.

In what Manner the Engagements of Sureties are extinguished, and of the different Exceptions which the Law allows them.

ARTICLE I.

In what Manner the Engagements of Sureties are extinguished.

[406] The obligation of a surety is extinguished,

1st, In all the different manners in which all other obligations are extinguished. These will be stated *infra*, Part III.

2d, It is the nature of such engagements, as well as of all accessory obligations, that the extinction of the principal obligation induces that of the accessory, and the liberation of the sureties, *supra*, n. 377. & *seq.*

3d, The surety is discharged when the creditor has disabled himself, by his own act, from ceding his actions against any of the principal debtors, to whom the surety had an interest to be subrogated, *infra*, Part III. c. 1. Art. VI. § 2.

4th, When the creditor has voluntarily received from the debtor an estate, in payment of a sum of money which is due to him, the surety is discharged, although the creditor is afterwards evicted from the estate ; the reason for doubting is, that the payment in this case is not valid, not having transferred to the person to whom it was made, the property of the thing, *infra*. Part III. c. 1. Art. III. § 3. consequently the principal obligation subsists ; whence it seems to follow, that of the sureties should likewise subsist. *Basset* IV. 22. 5. adduces an *arrêt* of his parliament by which it is so decided ; notwithstanding these reasons, and though it cannot be denied that in this case the payment is not valid, and that the principal obligation subsists, it was decided by some *arrêts* adduced by *Basnage*, *Trait. des Hyth. p. 3. c. fin.* that the creditor could not in this case proceed against the sureties, if the principal debtor had in the mean time become insolvent ; the decision of these *arrêts* is founded upon this principle of equity, that *nemo ex alterius facto pręgravari debet* ; the surety ought not to suffer prejudice from the arrangement between the creditor and principal debtor ; now, if in this case the creditor could proceed against the surety, he would suffer prejudice from the arrangement, by which the creditor has taken this estate in payment ; the creditor having deprived the surety of the power which he had, by paying the creditor whilst the debtor

the payment of an annuity, but A. received the purchase-money, the annuity having been set aside for want of being duly registered ; it was ruled that the defendant was not answerable in an action for the repetition of the purchase-money.

was

was solvent, of demanding from the debtor a restitution of the sum for which he had undertaken.

If the creditor had merely allowed the debtor a prolongation of the term of payment, and during this term the debtor became insolvent, would the surety be exempted from paying? *Vinnius Q. Illust.* 11. 42. holds the negative: This case is very different from the preceding; in the preceding case, the giving the estate in payment having made it appear till the time of the eviction as if the debt was acquitted, such an arrangement has deprived the surety of every means to provide for his indemnity, even if he perceived that the affairs of the debtor, for whom he became surety, were falling into derangement: for he could not demand that the debtor should discharge him from his engagement which, as well as the principal debt, appeared to be acquitted; but the mere prolongation of a term, allowed by the creditor to the debtor, does not the debt appear to be acquitted, nor deprive the surety of the means of providing for his indemnity, and of proceeding against the principal debtor, if he perceives that his affairs are beginning to be deranged (a), *si bona dilapidare cœperit l. 10. Cod. Mand.* he cannot then pretend that this prolongation of the term does him any injury, since on the contrary he has himself the advantage of it.

The obligation of sureties was extinguished also, according to the principles of the *Roman* law, by the confusion of which we have spoken, *supra*, n 383; which does not take place in *France*.

The pursuits of the creditor against the principal debtor, do not liberate the surety, who remains always obliged until payment, *L. 28. (b) Cod. de Fidejuss.* therefore the creditor may abandon his pursuits against the principal debtor, to sue the surety; but in ge-

(a) Si pro ea contra quam supplicas, fidejussor seu mandator intercessisti: & neque condemnatus es, neque bona [sua] eam dilapidare [postea] cœpisse comprobare possis, ut [tibi] justam metuendi causam præbeat, neque ab initio ita te obligationem suscepisse, ut eam possis & ante solutionem convenire: nulla juris ratione, antiquam satis creditori pro ea feceris, eam ad solutionem urgeri certum est: Fidejussorem vero, seu mandatorem exceptione munitum, et injuria judicis damnatum, & appellatione contra bonam fidem minime usum, non posse mandati agere, manifestum est.

(b) Generaliter sancimus quemadmodum in mandatoribus statutum est, ut contestatione contra unum ex his facta, alter non liberetur, ita et in fidejussoribus observari.

Invenimus etenim et in fidejussorum cautionibus plerumque ex pacto hujusmodi causæ esse prospectum, et ideo generali lege sancimus nullo modo electione unius ex fidejussoribus, vel ipsius rei alterum liberari, vel ipsum reum fidejussoribus, vel uno ex his electo, liberationem mereri, nisi satisfiat creditori; sed manere jus integrum, donec in solidum ei pecunie persolvantur; vel alio modo satis ei fiat. Idemque in duobus reis promittendi constitimus ex unius rei electione prejudicium creditori adversus alium non concedentes; sed remanere et ipsi creditori actiones integras, et personales et hypothecarias donec per omnia ei satisfiat. Si enim pactis conventis hoc fieri conceditur, et in usu quotidiano semper hoc versari perspicimus, quare non ipsa legis auctoritate hoc permittatur, ut nec simplicitas suscipientium contractus ex quacunque causa possit jus creditoris mutilare?

neral he may oppose to him the exception of discussion, of which we now proceed to treat,

ARTICLE II.

Of the Exception of Discussion.

SECTION I.

Origin of this Right.

[407] According to the law which was in use before the *Novel*, 4. (a) of *Justinian*, the creditor could demand of the surety the payment of what was due to him before applying to the principal debtor : *Jure nostro*, says *Antoninus Caracalla* in law 5. *Cod. de Fidejuss. est potestas creditori, relicto reo, eligendi fidejussores, nisi inter contrahentes aliud placitum doceatur.* The Emperors *Dioclesian* and *Maximian* decide the same in the law 19. (b) *Cod. d. tit. Justinian, Dic. Nov. cap. 1.* allowed to sureties the exception, which is called the exception of discussion, or of order, that is to say, by which they may refer the creditor who demands from them the payment of his debt, to discuss in the first place the goods of the principal debtor. This law of the *Novel* is followed in *France*, but not with respect to all sureties, nor in all cases.

(a) Si quis crediderit, & fidejussorem aut mandatorem aut sponso-rem, acceperit, is non primum adversus mandatorem, aut fidejussorem, aut sponso-rem accedat, neque negligens, debitoris intercessoribus molestus sit ; sed veniat primum ad eum qui aurum accepit, debitumque contraxit ; et si quidem inde receperit, ab aliis abstineat ; quid enim ei in extraneis erit, a debitore completo ? Si vero non valuerit a debitore recipere aut in partem, aut in totum, secundum quod ab eo non potuerit recipere, secundum hoc ad fidejussorem, aut sponso-rem, aut mandatorem veniat ; et ab eo quod reliquum est,umat : et si quidem presentes ei consistent ambo, et principalis & intercessor, & aut mandator aut sponso-ri ; hoc omni servetur modo. Si vero intercessor aut mandator, aut qui sponso-ri se subjecerit, adsit : principalem vero abesse contigerit, acerbum est, creditorem mittere alio, cum possit mox intercessorem, aut mandatorem, aut sponso-rem exigere. Sed et hoc quidem curandum est a nobis possibili modo : non enim erat quoddam hic antiquæ legi datum pro sanatione remedium, quamvis Papinianus maximus fuerit, qui hoc primitus introduxit. Probet igitur intercessorem, aut sponso-rem, aut mandatorem : & causæ præsidens judex det tempus intercessori (idem est dicere, sponso-ri et mandatori) volenti principalem deducere, quatenus ille prius sustineat conventionem : & sic ipse in ultimum subsidium servetur : sique solatio intercessori (aut sponso-ri & mandatori) in hoc quoque judex : fidejussoribus enim & talibus prodesse sancitum est, ut illo deducto, interim conventionem liberentur, qui pro eo in molestia fuerunt. Si vero tempus in hoc indultum excesserat (convenit namque etiam tempus definire judicantem) tunc fidejussor, aut mandator aut sponso-ri exequatur litem, & debitum exigatur contra eum pro quo fidejussit, aut pro quo mandatum scripsit, aut sponso-riem suscepit ; a creditoribus actionis sibi cessis.

(b) Si alienam reo principaliter constituto obligationem suscepisti, vel fidejussorio, vel mandatorio, vel quocunque alio nomine pro debitore intercessisti, non possis creditorem urgeri, eum, qui mutuum accepit pecuniam (magis) quam te convenire, scire debes ; cum si hoc in initio contractus specialiter non placuit, habeat liberam electionem.

that the creditor is not subject to a discussion which would be too difficult.

It is for this reason, that the *Novel*, in allowing the sureties the benefit of discussion, excepts the case in which the principal debtor is absent, unless the surety offers to produce him, within a short time allowed by the judge.

This exception is not allowed among us, as *Loyseau* justly remarks; the reasons on which it is founded arose from the difficulty which there was, according to the procedure of the *Romans*, in discussing a person who was absent. In *France* they have no application; the assignations and significations at the domicil, which have, according to our procedure, the same effect as if they were made personally, render the discussion of the principal debtor, when he is absent, as easy as if he were present.

[410] The creditor is only obliged to discuss the principal debtor before he proceeds further against the surety, when the surety demands it, and opposes the exception of discussion; therefore, although the creditor has not discussed the principal debtor, his demand, and his pursuits, against the surety are regular, until the surety opposes the exception of discussion.

Agreeably to these principles, it was decided by the *arrêt* of the first of *September*, 1705, cited by *Bretonnier sur Henrys*, that the judge could not, *ex officio*, ordain this discussion.

This exception of discussion is of the class of dilatory exceptions, since it only tends to put off the action of the creditor against the surety, until after the time of the discussion, and not to exclude it entirely; therefore, according to the rule common to dilatory exceptions, *L. 12. (a) Cod. de Except.* it ought to be opposed before the contestation of the cause. After the surety has contested the principal demand against him, without opposing it, he is not receivable, as by defending the substance of the charge he is held to have tacitly renounced these exceptions; *Guy Pape* and the *DD.* cited by him, *q. 50.* He might, nevertheless, be received in one case; that is, if the goods of which he demands the discussion, had only fallen to the principal debtor, after the contestation of the cause: for the rule, that dilatory exceptions ought to be opposed before the contestation of the cause, can only hold good with regard to exceptions already existing, and not with regard to those which only arise afterwards, as the defendant cannot be supposed, in contesting the principal demand, to have re-

(a) Si quis advocatus inter exordia litis prætermittam dilatoriam præscriptionem postea voluerit exercere; et ab hujusmodi opitulatione submotus, nihilominus perseveret, atque præposteræ defensioni insistit, unus libræ sursi condemnationis multatur.

nounced exceptions which did not exist till afterwards; *Guthieres*, and the DD. cited by him, *Traët. de Contr. Jurat.* xxii. 18.

§ IV. *What Goods is the Creditor obliged to discuss?*

[411] When the discussion is opposed, the creditor, if he has not an executory title against the principal debtor, should assign and obtain sentence of condemnation against him; by virtue of this sentence, or, without assignation, by virtue of his executory title when he has one, he ought to proceed *par commandement* against the principal debtor, and seize and levy execution on the moveables in his house.

If there are not any upon which execution can be levied, the officer ought to state this deficiency by a *procès verbal*, which operates as a mobiliary discussion.

With regard to the other effects, moveable and immoveable, which the principal debtor may have, the creditor, not being obliged to have any knowledge of them, is not obliged to discuss them, unless they are pointed out by the surety. This indication ought to be made at one time; and it should comprise all the property of the debtor, which he wishes the creditor to discuss; he will not be allowed, after the discussion of those which have been indicated, to point out any other. See the *arrêts* of *Lamoignon*, t. of Discussions, art. 9, the *arrêts* of the twentieth of January, 1701, reported by *Bretonnier sur Henrys*, vol. iv. 34.

[412] As the discussion ought not to be too difficult, the creditor cannot be obliged to the discussion of the property of the debtor which is out of the kingdom. *M. de Lamoignon* held, that he could not even be compelled to the discussion of those which were within the jurisdiction of another parliament. *Arrêts* of *Lamoignon*, *ibid.*

Neither is the creditor obliged to the discussion of the property of the debtor, which is in litigation; for he is not obliged to maintain a process, nor to wait the event of it to be paid; this is also a consequence of the above principle, that the discussion ought neither to be too long, nor too difficult.

For the same reason, he is not obliged to discuss the property hypothecated by the principal debtor, when the principal debtor has alienated it, and it is possessed by third persons; but on the contrary, these third persons have a right of referring the creditor to the discussion of the principal debtor, and his sureties.

It is otherwise with respect to those who have succeeded by an universal title to the goods of the principal debtor, such as universal donatories and legatees; and even the public revenue, when it has succeeded

succeeded to the principal debtor by escheat, or confiscation; these universal successors, *sunt loco heredis*; they are regarded as heir of the principal debtor, and represent him; they ought consequently to be discussed in the same manner as the principal debtor, so far as they are liable for his debts.

When several principal debtors have contracted an obligation in solido, and a third person has engaged as surety for one of them, the question arises, Whether such surety can oblige the creditor to discuss, not only that debtor for whom he is surety, but likewise all the other principal debtors? I think he may. To be convinced of it, it is sufficient to examine what the reason is upon which the exception of discussion is founded; it is not that it is presumed that the surety only intended to oblige himself in default, and in the case of the insolvency of the debtor, for whom he has undertaken; this intention ought to be expressed; when it is not so, it is not to be presumed, and the obligation is pure and simple; if this presumption holds good in ordinary engagements of sureties, the right which the surety would have of referring the creditor to the discussion of the principal debtor, would be a right which he would have in strict justice; the creditor would not have an action against the surety before the insolvency of the principal debtor had been manifested by the discussion; now, every body agrees that the exception of discussion, which the law allows to the surety, is only allowed him as a mere favour, and the demand of the creditor against the surety is well founded, although the principal debtor is solvent, and has not been discussed; we must then look for another reason for this exception of discussion: there is no other than this; that it is equitable, that in as far as it can be done, a debt shall be paid rather by those who are the real debtors and who have profited by the contract, than by those who are debtors for others; that it always goes against the grain to pay for another; therefore, it is only a reasonable indulgence that the creditor, when it makes very little difference to him, should spare the surety this mortification, and obtain payment rather from the real debtor than from him. This is the reason that *Quintilian, Declam. 273*, assigns for the benefit of discussion; after having said that it is a painful thing for a surety to be obliged to pay for another, *miserabile est*; he concludes, that a creditor cannot, without harshness, give the surety this mortification, when he can be paid by the real debtor; “*non aliter salvo pudore, ad sponsores venit creditor, quam si recipere a debitore non possit*.” now it is evident, that these reasons apply to obliging the creditor to the discussion, not only of the particular debtor for whom the surety has engaged, but also of all the other principal co-debtors; then the surety is well founded

in demanding the discussion, not only of that debtor for whom he has become surety, but even of the other principal debtors; it may even be said, that the person who becomes surety for one of several debtors in solido, is also in some measure surety for the others; for the obligation of all these debtors being only one obligation, by acceding to the obligation of the one for whom he becomes surety, he accedes to that of all.

§ V. *At whose Expence the Discussion ought to be made.*

[413] The discussion is made at the risk of the surety who demands it; and, as the discussion of immoveable goods cannot be made without much expence, the creditor may demand that the surety should furnish him with money for the purpose. This is a general rule for all the cases in which the exception of discussion is opposed. *Journal des Audiences, V. I. l. 5. c. 25.* and is a consequence of our principle.

§ VI. *Whether the Creditor, who has failed to make the Discussion, is responsible for the Insolvency of the Debtor?*

[414] There remains one question more; the creditor to whom the surety has opposed the exception of discussion, has not thought proper to make it soon enough, and has let several years elapse, during which the debtor has become insolvent; can he, by a subsequent discussion, revive his claim against the surety? I think that the creditor is well founded, and that the surety cannot oppose any *fin de non-recevoir*, upon the pretext that he did not proceed soon enough to the discussion of the goods of the principal debtor to which he was referred; the reason is, that the right which allows to sureties the exception of discussion given them by the *Novel*, is confined to suspending the pursuits of the creditor against themselves, until he has proceeded against the principal debtor and has discussed his goods; the benefit given by this *Novel* is limited to this, as it is there expressed, *creditor non primum ad fidejussorem aut sponforem accedat*; but provided the creditor does not proceed against the sureties, before he has proceeded against the principal debtor, and discussed his goods, he cannot be obliged to proceed against him until he thinks proper: the law having fixed the time in which a creditor may exercise his actions, the surety cannot impose a shorter term upon him than that which the law allows: *Nemo invitatus agere compellitur, toto tit. Cod. ut nemo invitatus, &c. creditor ad petitionem debiti urgeri minime potest, l. 20. Cod.*
de

de Pign. Then if the principal debtor, to the discussion of whom the creditor has been referred, has afterwards become insolvent, the surety ought not to blame the creditor for not having proceeded against him while he was solvent; the creditor was not obliged to do so, and the surety, if he apprehended the insolvency, might have obviated it by proceeding against the principal debtor himself, as he had a right so to do, as soon as he was assigned, *infra. n.* 450. *Henrys, v. ii. b. iv.* is of our opinion, he supports it by an *arrêt* pronounced in a case nearly similar; and testifies that it was in his time the common opinion of the bar of *Paris*. The custom of *Brittany, art. 192.* contains a contrary disposition: I think it ought to be confined to that province: *D'Argentré* upon this article, says, that this disposition, taken from the ancient custom, was retained at the reformation, contrary to his opinion.

We have only treated the question as it relates to ordinary sureties; but if the surety had only engaged to pay what the creditor could not recover from the principal debtor, *in id quod servari non poterit*, the creditor, who had the means for a considerable time of obtaining payment, would not be easily admitted to make a claim against the surety, after the debtor at the end of a considerable time had become insolvent, *L. 41. ff. de tit. (a)* because this surety, who had only engaged for what the creditor could not recover, might object that the creditor would have had no difficulty in recovering from the principal debtor what was due to him, and that consequently, he does not owe him any thing.

A R T I C L E III.

Of the Exception of Division.

S E C T I O N I.

Origin of this Right.

[415] When several persons engage as sureties, of a principal debtor of the same debt, they are each of them held to oblige themselves for the whole debt, "*si plures sint fidejussores, quotquot erunt numero, singuli in solidum tenentur.*" *Instit. tit. de Fidej. § 4.*

In this respect, several sureties differ from several principal debtors, each of whom is understood to be only obliged for his own part of what is jointly promised, if the solidity of the obliga-

(a) Si fidejussores in id accepti sunt, quod a curatore servari non possit, & post impletam legitimam aetatem, tam ab ipso curatore, quam ab heredibus ejus solidum servari potuit, & cessante eo, qui pupillus fuit, solvendo esse defecit: non temere utilem in fidejussores actionem competere.

tion is not expressed; the reason of the difference is, that it is of the nature of the engagement of a surety to oblige himself to every thing that is due from the principal debtor, and consequently each of those who undertake as sureties for him, is understood to contract this engagement, unless it be expressly declared, that he is only obliged for his own part. This is the reason given by *Vinnius*, *Select. Quest. lib. ii. c. 40.*

The emperor *Adrian* introduced a modification of this solidity, by the exception of division which he allowed to sureties; the surety from whom the creditor demands the whole of the debt, obtains by this exception a right to demand, that the creditor shall be bound to divide, and apportion his demand between him and his co-sureties, provided they are solvent, and consequently, that he may be received to pay to the creditor his portion, saving the right of the creditor to proceed for the remainder against the others: this law has been adopted in *France*.

§ II. Of the Persons who can or cannot oppose the Exception of Division.

[416] There are some sureties who cannot oppose this exception: such as sureties for the king's revenues. See *Le Bret. Plead. 42. in fin.*

Judiciary sureties are also excluded from it. According to the opinion of *Basnage*, sureties, who by their engagements have renounced this exception, are not entitled to it.

When it is expressed in the engagement that the sureties are obliged in solido, and as principal debtors, is this clause understood to include a renunciation of the exception of division? Those, who think that such a clause does not include a renunciation of the exception of discussion, would also think that it does not include a renunciation of the exception of division: but the reasons which induced us to think that it included a renunciation of the exception of discussion and which we stated, *supra*, n. 408. induce us likewise to think that it imports the renunciation of that of division.

Lastly, the laws refuse the exception of division to sureties, who have begun their defence by *mala fide* denying the truth of their engagement. *Inficientibus auxilium divisionis non est indulgendum. L. 10. § 1. ff. de Fidej.*

[417] Not only sureties themselves, but likewise their heirs may take advantage of this exception.

The certifier of a surety, who is *fidejussor fidejussoris*, may also oppose the same exceptions, as the surety whom he has certified,

and consequently he may oppose this exception, and demand the division of the debt between himself and his co-sureties of the person whom he has certified.

§ III. *Between what Persons the Debt ought to be divided.*

[418] The surety may demand the division of the action between himself and the other sureties, who are equally principal sureties; but he cannot demand that it should be divided between him and his own certifier, in respect of whom he is himself a principal debtor. *L. 27. (a) § 4. ff. de Fid.*

[419] It is requisite also, that those with whom the surety demands that the action of the creditor shall be divided, be sureties of the same debtor; therefore, if two debtors in solido of the same debt had each given a surety, the surety of one of them could not demand that the action should be divided between himself and the surety of the other, for though they are sureties of the same debt, as they are not sureties of the same debtor, they are not properly co-sureties. This is the decision of the laws, 43. (b) 51. (c) *fi. § 2. ff. dic. tit.*

[420] Lastly, it is necessary that the co-sureties, with whom the surety demands that the action should be divided, be solvent; and they are understood to be so, if being otherwise themselves, they are so by their certifiers; this is decided by the law 27. § 2, *se queratur an solvendo sit principalis fidejussor, etiam vires sequentis fidejussoris, ei aggregande sunt.*

But if my co-surety was solvent at the time of contesting the cause, and consequently the action of the creditor has been divided between him and me, although he afterwards becomes insolvent, the creditor can no longer come against me for his part; this is the decision of *Papinian*, *L. 51. (d) § 4. & L. 52. (e). § 1.*

(a) Si fidejussor fuerit principalis, et fidejussor fidejussoris, non poterit desiderare fidejussor ut inter se et eum fidejussorem pro quo fidejussit, dividatur obligatio: ille enim loco rei est; nec potest reus desiderare, ut inter se et fidejussorem dividatur obligatio.

(b) Si a Titio stipulatus, fidejussorem te acceperim, deinde eandem pecuniam ab alio stipulatus, alium fidejussorem accipiam, confidejussores non erunt, quia diversarum stipulationum fidejussores sunt.

(c) Duo rei promittendi separatim fidejussores dederunt, invitus creditor inter omnes fidejussores actiones dividere non cogitur; sed inter eos duntaxat, qui pro singulis intervenerunt, plane si velit actionem suam inter omnes dividere, non erit prohibendus; non magis quam si duos reos pro partibus conveniret.

(d) Cum inter fidejussores actione divisa quidam post litem contestatam solvendo esse desierunt, ea res ad onus ejus, qui solvendo est, non pertinet; nec auxilio defendetur ætatis actor; non enim deceptus videtur, jure communi usus.

(e) Inter fidejussores actione divisa, condemnatus si desierit esse solvendo; fraus vel segnitia tutoribus, qui judicatum persequi potuerunt, damnum dabit; quod, si divisam actionem inter eos qui non erant solvendo, constabit; papilli nomine restitutionis auxilium implorabitur.

In this respect, the exception of division differs from that of discussion; the reason of the difference arises from the different nature of these exceptions; that of discussion is only dilatory, it only defers the action of the creditor against the surety, till after the creditor has discussed the principal debtor; whereas, the exception of division is in the nature of a peremptory exception: when it attaches, it entirely destroys the action of the creditor against the surety who opposed it, for the part of his co-sureties with whom the division is allowed, and therefore the creditor can no longer come upon him, even if the co-sureties should afterwards become insolvent.

Further, even if my co-surety is insolvent before the demand of the creditor, if the creditor has voluntarily divided his action, by demanding from us separately our respective parts, he cannot afterwards demand from me the part of my insolvent co-surety; this is the decision of *Gordianus* in the law, 16. (a) *Cod. d. t.*

[421] Provided that my co-surety be solvent, although the term, or the condition under which he is obliged, be not yet expired, I may nevertheless demand that the action be divided between him and me provisionally, saving the right of the creditor to come upon me for the part of the co-surety, if at the expiration of the term or condition he should not be solvent. *L. 27. (b) ff. de Fid. and à fortiori*, if the condition under which he is obliged, happens to fail.

[422] As the demand of the creditor is only subject to be divided, when the co-sureties are solvent, if there is a dispute between the creditor and the surety, who demands the division, upon the fact whether the co-sureties are or are not solvent, the surety, upon offering to pay his part, may demand, that previous to deciding the point as to the residue, the creditor shall, at the risk of the surety, be bound to discuss the co-sureties. *L. 10. (c) ff. d. t.*

[423] I cannot oppose the exception of division, if my co-surety resides out of the kingdom; for this exception is

(a) Liberum fuit antequam lis adversus omnes fidejussores contestaretur, unum eorum eligere creditori, si modo cæteros minus idoneos existimaret. At nunc post litis contestationem petitionem divisam redintegrari juris ratio non patitur.

(b) Si plures sint fidejussores, unus pure, alius in diem, vel sub conditionem acceptus, succurri oportet ei, qui pure acceptus est, dum existere conditio potest; scilicet ut interim in virilem conveniatur, sed si cum conditio extitit, non est solvendo, qui sub conditione acceptus est, restituendam actionem in pure acceptam, Pomponius scribit.

(c) Si dubiet creditor, an fidejussores solvendo sint, et unus ab eo electus, paratus sit offerre cautionem, ut suo periculo confidejussores conveniantur in parte; dico audiendum eum esse; ita tamen et si satisfactiones offerat, et omnes confidejussores, qui idonei esse dicuntur, præsto sint, nec enim semper facilis est nominis emptio, cum numeratio totius debiti non sit in expedito.

a favour which the law only grants in as much as the creditor does not suffer too great inconvenience from it. *Papon* x. 4. 25.

§ IV. *Whether a Division can be required with a Surety whose Contract is not valid, and with a Minor Surety?*

[424] When I oblige myself as a surety jointly with a person who was not capable of contracting such an obligation, as were all women by the *Roman* law, I can no more avoid paying the whole of the debt, than if I were the only surety; as the co-surety, who was not capable of contracting such an engagement, ought not to be regarded. In this case, there is no distinction whether I contract my engagement at the same time with the other person, before or after.

It is otherwise according to the *Roman* law; when I have engaged as surety with a minor, who has afterwards obtained restitution against his obligation, I am only liable for the whole of the debt, in case I had at first contracted the engagement alone, and without reckoning upon the concurrence of the minor, who has only become surety, subsequent to me; but if we engaged at the same time, his obtaining a restitution against his obligation ought not to subject me alone to the debt which I had expected him to have paid jointly with me. *L. 48. pp. § 1. ff. de Fid. (a)*

Papinian gives this reason for the difference between a woman and a minor; a person who becomes surety jointly with a woman, ought not to rely upon her dividing the obligation with him, since he ought to know that she was incapable of it; *cum ignorare non debuerit mulierem frustra intercedere*; but it is otherwise with respect to a person who becomes surety with a minor, *propter*, says *Papinian*, *incertum ætatis et restitutionis*, because he might not know that he was a minor, or might hope that he would not contravene his obligation by obtaining restitution against it; it was rather the business of the creditor to inform himself of it, when he received the minor as a surety; and it is the creditor, rather than the other surety, who ought to suffer from the restitution. *D. L. 48. pp. § 1.*

Whatever respect I have for the decisions of the great *Papinian*, this decision appears to me to be subject to some difficulty; several

(a) Si Titius et Seia pro Mævio fidejusserint, subducta muliere, dabimus in solidum adversus Titium actionem, cum scire potuerit, aut ignorare non debuerit, mulierem frustra intercedere. Huic similis et illa questio videri potest, ob ætatem si restituatur in integrum unus fidejussor, an alter onus obligationis integrum excipere debeat? Sed ita demum alteri totum irrogandum est, si postea minor intercessit, propter incertum ætatis ac restitutionis. Quod si dolo creditoris inductus sit minor ut fidejubeat, non magis creditori succurrendum erit adversus confidejussorem, quam si facta novatione circumvento minore desideraret in veterem debitorem utilem actionem sibi dari.

sureties being, as we have already seen, debtors of the whole debt, the division which was granted by the constitution of *Adrian*, when they are all solvent, is only a favour which ought not to be granted to the prejudice of the creditor. This reason, on account of which I am refused the division of the debt with my co-surety, when he has become insolvent, equally extends to refusing it when the co-surety has obtained restitution against his engagement; there is no reason why it should be allowed in the one case rather than in the other; I ought not to have relied more upon the one than upon the other; if I could have foreseen the insolvency, I could still more easily have foreseen the restitution. It cannot be said that the creditor agreed to run this risk in accepting of the engagement of a minor; for, not being satisfied with the engagement of the minor alone, and having required that another surety should be joined to him, it is on the contrary a proof, that he looked for a security against the restitution, and that he did not choose to subject himself to this risk.

These reasons appear to me sufficient to decide, without distinction, contrary to the authority of the *Roman* law, that the restitution obtained on account of minority, by my co-surety, ought, in the same manner as his insolvency, to subject me to the whole of the debt.

And further if, even before the minor had instituted a process to invalidate his engagement, I was proceeded against by the creditor, and opposed to him the exception of division, I think it would be equitable that he should not be obliged to divide his action, except with a reservation of coming upon me, provided the minor should obtain restitution.

But if the creditor had consented to the division of his action, without any reservation, there is reason to think that, in this case, he would have taken upon himself the risk of the restitution, and would not have any recourse against me.

§ V. *At what Time the Exception of Division may be opposed.*

[425] A question has been proposed, Whether the exception of division could only be opposed before the contestation of the cause? Some ancient doctors, as *Pierre de Belleperche*, *Cynus*, and others, were of this opinion; but the contrary opinion, which is followed by *Vinnius*, *sel. Quest.* 11. 40. is more correct; it is founded upon the formal text of law 10. § 1. *Ced. h. tit. Ut dividatur actio inter eos qui solvendo sunt, ante condemnationem, ex ordine solet postulari.* It is sufficient, according to the terms of this law, to demand the division of the action before the sentence, and consequently,

quently, it may be done after the contestation of the cause; in fact, this is rather a peremptory than a dilatory exception, as it tends to exclude the action of the creditor entirely against the person who opposes it for the parts of his co-sureties. The text of the institutes, *tit. (a) de Fid. § 4*, upon which those of the contrary opinion rely, does not prove any thing; it says, indeed, that all the parties ought to be solvent, at the time of the contestation of the cause, to warrant a division of the action; but it does not follow from that, that this division may not be demanded afterwards.

The law *(b) 10. § 1. ff. de Fid.* where it is said, that the surety, who has denied his engagement, is not receivable to oppose the exception of division, is not contrary to our decision, for it is the denial made *malâ fide*, which renders him unworthy of this favour, and not receivable in this exception, and not the *litis-contestatio*. The *litis-contestatio* between the creditor and the surety, does not suppose that the surety has denied his engagement; it might have intervened upon any other point; for instance, upon the surety having alleged that the debt was discharged, or that there was some *fin de non recevoir*, which excluded the creditor from his demand. Some doctors have gone into the opposite extreme, in deciding that the exception of division may be opposed even after the judgment of condemnation, according to the example of the exception *cedendarum actionum*, and of exceptions *Sæli Macedoniani* & *Sæli Velleiani*. This opinion is contradicted by the law *(c) 10. § 1. Cod. de Fid.* where it is said, that sureties may propose the exception of division before the judgment of condemnation, *ante condemnationem*; then they cannot do it afterwards. As to the instances adduced of exceptions, which may be opposed even after judgment, the answer is, that there is a great difference between the exception of division and the exception *cedendarum actionum*; the latter does not impugn the sentence, nor the right acquired by the creditor, who has no interest in refusing the cession of his actions to the surety, when he has paid the debt; on the contrary, the exception of division, if it were proposed after the judgment of condemnation, attacks this judgment, and the right which the creditor acquires by it; since it

(a) Si plures sint fidejussores: quotquot erunt numero, singuli in solidum tenentur. Itaque liberum est creditori, à quo velit, solidum petere. Sed ex epistola divi Hadriani compellitur creditor à singulis, qui modo solvendo sunt, *litis contestatæ* tempore, partes petere. Ideoque si quis ex fidejussoribus eo tempore solvendo non sit, hoc cæteros onerat. Sed si ab uno fidejussore creditor totum consequutus fuerit; hujus solius detrimentum erit, si is, pro quo fidejussit, solvendo non sit; et sibi imputare debet, cum potuerit juvari ex epistola divi Hadriani et desiderare, ut pro parte in se detur actio.

(b) Vide supra, n. 416.

(c) Ut autem is, qui cum altero fidejussit, non solus conveniatur, sed dividatur actio inter eos, qui solvendo sunt; ante condemnationem ex ordine postulari solet.

tends to restrain to a part the right thus acquired by the creditor to the whole: with respect to what is decided concerning the exceptions of *Sæi Macedoniani* & *Sæi Velleiani*, it is a peculiar right founded upon the favour of these exceptions, and upon a kind of public interest, *ad coercendos fœneratores* & *ad subveniendum sexui muliebri*; this particular right cannot be drawn into consequence, and cannot be extended to the exception of division, nor to other peremptory exceptions. *Vin. ibid.*

When the judgment of condemnation is suspended by an appeal, it may be said, that there is no condemnation until there is a definitive sentence; whence it follows, that the surety may be admitted in a cause of appeal, to oppose the exception of division. This is the opinion of the doctors, cited by *Bruneman*, *ad L. 10. Cod. de Fid.*, it is also the opinion of *Vinnius*.

§ VI. Of the Effect of the Exception of Division.

[426] The effect of the exception of division is, that the judge will decree the division of the debt between the sureties who are solvent, and thereby restrict the demand against the surety who opposed the division, to his part only.

Before this division of the debt is pronounced by the judge, upon the exception of division, or has been voluntarily made by the creditor, by a demand against each of the sureties for his part, *L. 10. (a) Cod. de Fid.* each of the sureties is really debtor of the whole; therefore, if one of them has paid the whole, he cannot have any repetition of the parts of his co-sureties against the creditor (*b*), *L. 49. § 1. ff. de Fid.* for he actually owed the whole, by reason of his not using the exception of division which he might have done, *plenius fidem exsolvit*. But after the division of the debt is pronounced, the debt is so divided, that if one of the sureties, between whom the debt was divided, should become afterwards insolvent, the creditor cannot have any recourse against the others for his part. *L. 51. (c) § 4. ff. de Fid.*

(a) Vide supra, n. 420.

(b) Ex duobus fidejussoris heredibus, si per errorem alter solidum exsolvat, quidam putant habere eum conditionem, et ideo manere obligatum coheredem; cessante quoque conditione, durare obligationem coheredis probant; propterea quod creditor, qui, dum se putat obligatum, partem ei, qui totum dedit, exsolverit; nullam habebit conditionem. Quod si duo fidejussores accepti fuerint (verbi gratia) in viginti, & alter ex duobus heredibus alterius fidejussoris totum creditori exsolverit; habebit quidem decem, quæ ipso jure non debuit, conditionem; an autem et alia quinque (millia) repetere possit, si fidejussor alter solvendo est, videndum est; ab initio enim heres fidejussoris, siue heredes, ut ipse fidejussor, audiendi sunt; ut scilicet pro parte singuli, fidejussores qui sunt, conveniantur.

(c) Vide supra, n. 420.

There remains a question, Whether, if the surety who demands the division of the action of the creditor, between himself and his co-surety, had previously paid a part of the debt, he ought to pay the moiety of what remains due, without bringing into account what he has already paid? *Papinian* decided in the affirmative; *eam enim quantitatem inter eos convenit dividi, quam litis tempore debent*. This decision, although conformable to the rigour of the principle, has not been followed, and it has been deemed more equitable to allow the surety the right of placing what he has already paid, to the account of the part of the debt, for which he is bound, and not to oblige him to pay more than the remainder of his part of the whole debt, and to charge his co-surety with the whole of the residue, *sed humanius est*, says the annotator, *si et alter solvendo sit, per exceptionem ei, qui solvit, succurri, d. L. 51. (a) § 1.*

A R T I C L E IV.

Of the Cession of Actions, or Subrogation which the Creditor is obliged to make to the Surety who pays him.

[427] A third benefit which the laws allow to the surety, is, that when he pays, he may require of the creditor to subrogate him to all his rights, actions, and hypothecations, as well against the principal debtor for whom he has become surety, as against all the other persons who are liable for the debt: this results from the law 17. (b) *ff. de Fid. L. 21. (c) Cod. dic. tit.* and from a number of other texts. See *infra*, Part III. c. 1. Art. VI. § 2.

S E C T I O N VII.

Of the right which the Surety has against the Principal Debtor, and against his Co-sureties.

[428] The surety has recourse against the principal debtor after he has paid: we shall treat of this recourse in the first article; there are some cases, in which the surety has an action

(a) Fidejussor, qui partem pecunie, suo nomine nil rei promittendi, solvit, quominus residui divisione facta portionis judicium accipiat, recusare non debet; eam enim quantitatem inter eos, qui solvendo sunt, dividi convenit, quam litis tempore singuli debent: sed humanius est, si et alter solvendo sit, litis-contestationis tempore, per exceptionem ei, qui solvit, succurri.

(b) Fidejussoribus succurri solet, ut stipulator compellatur ei, qui solidumolvere paratus est, vendere cæterorum nomina.

(c) Sicut eligendi fidejussor creditor habet potestatem, ita intercessorem postulantem cedi sibi hypothecæ, five pignoris obligata jure non prius ad solutionem (nisi mandata super hac re sperit persecutio) convenit urgeri.

against

against the principal debtor, before he has paid ; of which we shall speak in the second article ; in the third we shall treat of the particular question, Whether the surety of an annuity (*rente constituée*) may, at the end of a certain time, oblige the debtor to redeem the annuity ? we shall, in the fourth, treat of the right of the surety against his co-sureties.

A R T I C L E I.

Of the Recourse of the Surety, against the principal Debtor after having paid.

§ I. *What Action the Surety has against the principal Debtor, after having paid.*

[429] After the surety has paid, if he has procured a subrogation to the rights and actions of the creditor, he may exercise them against the debtor, as the creditor himself might have done : if he has neglected to acquire this subrogation, he has still in his own right an action against the principal debtor, to reimburse him what he has paid.

This is the *actio mandati contraria*, if the engagement was made with the knowledge and approbation of the principal debtor : for the consent includes a tacit contract of mandate, according to the rule of law, *semper qui non prohibet pro se intervenire mandare creditur*, L. 60. ff. de R. J. If the surety is obliged for the principal debtor without his knowledge, he cannot have an action *mandati* against him, but an action *contraria negotiorum gestorum*, which has the same effect.

§ II. *What Payment gives a Right to these Actions.*

[430] It is of no importance, whether the surety has paid in consequence of a sentence of condemnation, or voluntarily and without a sentence ; for in both cases, *utiliter debitoris negotium gessit*, he has procured for him the liberation from his debt, and consequently he ought to reimburse him what it has cost to do so.

It matters not whether the payment was an actual payment, or a compensation, or a novation ; in all these cases, he has a right to demand that the principal debtor shall reimburse him, either the sum which he has paid, what he has allowed in compensation, or what he has obliged himself to pay, in order to extinguish the obligation of the principal debtor.

[431] But if the creditor, from regard to the surety, has made a gratuitous remission of the debt, the surety cannot demand any thing from the principal debtor who has profited by this remittance, because it has cost the surety nothing; but if the remission was made for the recompense of services, which the surety has rendered the creditor, the surety may require to be reimbursed the amount of the debt by the principal debtor: for in this case it has cost the surety the recompense which he might have expected for his services. This is the disposition of the law 12. (a) ff. *Mandat.* and it is conformable to this maxim of the law 20. § 4. ff. *d. tit. sciendum est non plus fidejussorem consequi debere mandati judicio, quam quod solverit.*

§ III. *Three Conditions, upon which the Payment made by the Surety entitles him to an Action against the principal Debtor.*

[432] That the payment made by the surety should entitle him to these actions, it is requisite,

1st, That the surety shall not by his own fault have neglected any *fin de non recevoir*, which he might have opposed to the creditor.

2d, That the payment shall have been valid, and liberated the principal debtor.

3d, That the principal debtor shall not have paid a second time, through the fault of his surety.

First Condition.

[433] For the surety who has paid, to have recourse against the principal debtor, it is necessary that he should not by his own fault have neglected to oppose the *fin de non recevoir*, if he had any, against the creditor: for instance, if any person has become my surety, for the price of an estate which I have purchased, and knowing that I have been evicted from the estate, he notwithstanding pays the price to the person who sold it to me, he will have no recourse against me, because he could have avoided paying, by opposing to the seller the exception arising from the eviction which I have suffered: but if the surety were ignorant of the eviction, and consequently of the exception resulting from it, I shall be obliged to restore him what he has paid, saving my recourse against the seller; for he is in no fault for not having opposed an exception of which he was ignorant, and it is I, on the contrary, who am to blame for not having apprised him of it.

(a) Si vero non remunerandi causa, sed principaliter donando, fidejussori similis actio, mandati cum non actum.

The law 29. (a). *ff. Mandat.* establishes these principles in a similar instance; but it is only an ignorance of fact, which can, in this case, excuse the surety: it would be otherwise with respect to an ignorance of the law: for instance, I have purchased a house which I supposed to subsist, but which had been entirely consumed by fire previous to the contract, and you are my surety for the price, although you should, after knowing of the accident, pay the price which from an error you believed to be due, you ought not to have any recourse against me. *d. l. (b) 29. § 1.*

[434] If the surety had a *fin de non recevoir*, to oppose to the creditor, but it was such that he could not in honour oppose; in this case the surety is not indeed obliged to oppose it; but he ought not to deprive the debtor of the power of opposing it, therefore he ought to allow himself to be assigned for the payment, and have the principal debtor made a party to the cause, in order that he may oppose it, if he thinks proper; in default of doing so, the surety will have no recourse against the principal debtor for what he has paid, as appears by the law 48 (c) *ff. Mand. & l. 10. (d) § 12. dic. tit.*

We may adduce as an instance of these *fins de non recevoir*, which cannot be honourably opposed, that which may be opposed to the creditor of an annuity, who has suffered more than five years to accumulate.

[435] The rule which we have established, that the surety, in order to have recourse against the principal debtor, ought

(a) Si fidejussor conventus, cum ignoraret non fuisse debitori numeratam pecuniam, solverit ex causa fidejussionis, an mandati judicio persequi possit id, quod solverit, quaeritur? Et si quidem sciens prætermiserit exceptionem vel doli, vel non numeratæ pecuniæ, videtur dolo versari; dissoluta enim negligentia prope dolum est. Ubi vero ignoravit, nihil quod ei imputetur. Pari ratione et si aliqua exceptio debitori competebat, pacti forte conventi, vel ejus alterius rei, et ignarus hanc exceptionem non excercebit, dici oportet, ei mandati actionem competere; potuit enim atque debuit reus promittendi certiorare fidejussorem suum, ne forte ignarus solvat indebitum.

(b) Non mali tractabitur, si, cum ignoraret fidejussor inutiliter se obligatum, solverit, an mandati actionem habeat? Et si quidem factum ignoravit, recipi ignorantia ejus potest: si vero, jus, aliud dici debet.

(c) Quintus, Mucius Scaevola ait, Si quis sub usuris creditam pecuniam fidejussisset, et reus in judicio conventus cum recusare vellet sub usuris creditam esse pecuniam, (&) fidejussor solvendo usuras potestatem recusandi eas reo sustulisset, eam pecuniam a reo non petiturum: sed si reus fidejussori denunciasset, ut recusaret, sub usuris debitam esse, nec is propter suam existimationem recusare voluisset, quod ita solverit, a reo petiturum. Hoc bene censuit Scaevola: parum enim fideliter facit fidejussor in superiore casu, quod potestatem eximere reo videretur, suo jure uti: cæterum in posteriore casu non oportet esse noxiæ fidejussori, si ipse peperciisset pudori suo.

(d) Generaliter Julianus ait, si fidejussor ex sua persona omiserit exceptionem, qua reus uti non potuit, si quidem minus honestam, habere eum mandati actionem: quod si eam, qua reus uti potuit, si sciens id fecit, non habiturum mandati actionem; si modo habuit facultatem rei conveniendi, desiderandique, ut ipse susciperet potius judicium vel suo vel procuratorio nomine.

not to have omitted by his default to oppose the *fins de non recevoir*, which he had to oppose, is subject to an exception, when these *fins de non recevoir* were personal to himself, and could not be opposed by the principal debtor: for instance, if the surety who has engaged for me till a certain time, pay for me after this term; though he might have avoided paying, he will, notwithstanding, have recourse against me, because he has paid for me what I could not have avoided paying, which is the decision of the law 29. § 6. *ff. Mand. quamquam enim jam liberatus solverit fidem implevit et debitorem liberavit.* That he has procured my liberation at his expence, is a sufficient reason why I should indemnify him; otherwise I should be enriched at his expence, which equity does not allow, *neminem, æquum est, cum alterius detrimento locupletari.*

Second Condition.

[436] For the surety to have recourse against the principal debtor, it is necessary that the payment which he has made be valid: therefore if a person owes me a horse indeterminate, and another engages as surety on his behalf, and this surety afterwards furnishes me with one, which turns out not to belong to him, the surety will not have recourse against the principal debtor; because the payment which he has made is not valid, and has not procured the liberation of the principal.

[437] This rule is subject to an exception, in the case where the surety being sued by the creditor should pay, through ignorance, what the principal debtor had already paid; for although the payment made by the surety, being the payment of a sum which had ceased being due, be not a valid payment, nevertheless, the surety will still have recourse, *actione mandati contraria*, against the principal debtor, to be reimbursed the sum which he has paid, upon subrogating the principal debtor to his action of repetition against the creditor: this is the decision of the law 29. (a) § 2. *ff. Mandat.* The principal debtor is in default, for not having informed the surety that he had paid.

This decision does not apply when the surety has engaged as such for the principal debtor, without his knowledge: for in this case the principal is in no fault, for not having notified the payment to the surety, of whose undertaking he had not any knowledge.

(a) Si, cum debitor solvisset, ignarus fidejussor solverit, puto eum mandati habere actionem: ignoscendum est enim ei, si non divinavit debitorem solvisse: debitor enim debuit notum facere fidejussori, jam se solvisse, ne forte creditor obsecpat, et ignorantiam ejus circumveniat, et excutiat ei summam in quam fidejussit.

Third Condition.

[438] A third case, in which the surety who has paid has no recourse against the principal debtor is, when the principal, in consequence of default of the surety in not apprising him of the payment, has paid the creditor a second time ; but at least he may demand, that the principal should cede to him his action, to reclaim from the creditor what he received when it was no longer due to him : this is the decision of the law 29. (a) § 3. ff. *Mand.*

According to our usages, these cessions are supplied by operation of law, and it would be allowed to the surety to recover from the creditor *rectè vidè*, what he has received a second time.

§ IV. *When the Surety who has paid, may exercise his Right of Recourse.*

[439] Regularly the surety who has paid, may have recourse against the principal debtor as soon as he has paid for him ; but if he had paid before the expiration of the term, he can only have recourse against him after ; for the surety ought not by his act to deprive the principal of the term, which he has a right to enjoy. L. 22. (b) § 1. L. 15. (c) ff. *Mandat.*

§. V. *When there are several principal Debtors, has the Surety an Action against each of them, and for how much ?*

[440] The surety may by the *actio contraria mandati*, or by that of *contraria negotiorum gestorum*, proceed against each of the principal debtors, for whom he has become surety for the repetition of the whole of what he has paid : for each of these principal debtors, being debtor of the whole of the debt in favour of the creditor, the surety by becoming such for each of them, and by paying,

(a) Hoc idem tractari et in fidejussore potest : si cum solvisset, non certioravit reum, sic deinde reus solvit, quod solvere cum non oportebat, et credo, si cum posset (eum) certiorare, non fecit, oportere mandati agentem fidejussorem repelli : dolo enim proximum est, si post solutionem non nunciaverit debitori, cedere autem reus indebiti actionem fidejussori debet, ne duplum creditor consequatur.

(b) Si cum in diem deberem, mandatu meo in diem fidejusseris et ante diem solveris, an statim habeas mandati actionem ? Et quidam putant, præsentem quidem esse mandati actionem, sed tanti minorem, quanti mea interfit, superveniente die solutum fuisse : sed melius est dici, interim nec hujus summæ mandati agi posse : quando nonnullum adhuc commodum meum sit, ut nec hoc ante diem solvam.

(c) Si mandassem tibi, ut fundus emeris, postea scripsissem ne emeris, tu antequam scias me vetuisse, emisisses, mandati tibi obligatus ero : ne damno adficiatur is, qui suscepit mandatum.

has liberated each of them from the whole, and consequently he has a right to conclude in solido against each of them, for the reimbursement of the whole of what he has paid, with interest from the day of his demand.

If the payment made by the surety included interest and arrears, such interest and arrears become principal, with regard to the surety who paid them, as against the debtor for whom he has paid, and the surety is entitled to interest upon the whole from the time of his demand; *arrêt* reported by *Papon* X. 4. 20.

Observe, however, that for the sum paid for interest and arrears, the surety who has obtained a subrogation to the rights of the creditor, will rank against the debtor in the same degree, as the creditor would have done if he had not been paid; but as he is only entitled to the interest upon that sum, in his own right, he will only be entitled to rank for such interest from the day of the act of indemnity passed before a notary, if the debtor has passed any; or if he has not, from the day of the condemnation which he has obtained against him.

The surety who demands from one of the principal debtors, for whom he has become surety, the whole of the debt which he has discharged, ought to cede to this debtor, not only his actions in his own right against the other debtors, but also the actions of the creditor to whom he may have procured a subrogation; if the surety in paying the creditor has neglected to acquire this subrogation, and has thereby incapacitated himself from assigning it to the principal debtor from whom he demands the whole of the debt, this debtor may, on offering to reimburse him for his own part, obtain, *per oppositam actionem cedendarum actionum*, a liberation from the demand of the surety for the parts of the other principal debtors.

This takes place if the principal debtor had in fact an interest in having the subrogation; but if he has no such interest, if the subrogation to the actions, which the surety has in his own right, will give the same advantage against his co-debtors, as the subrogation to the actions of the creditor, he has no reason to complain that the surety did not, when he paid, require the subrogation of the actions of the creditor, and cannot procure it for him; and consequently he cannot avail himself of the exception *cedendarum actionum*.

This will appear by the following example: several debtors have borrowed in solido, a sum of money from a creditor under my engagement as surety, and each of them has given me an act of indemnity before a notary, of the same date as the obligation which they have contracted in favour of the creditor. I have acquitted the debt without requiring a subrogation to the actions of the

creditor, and demand a reimbursement of the whole from one of the debtors; it is evident that he cannot complain of my not being able to procure for him the subrogation of the actions of the creditor: for the action which I have against the co-debtors, and to which I am ready to subrogate him, having the benefit of an hypothecation, of the same date as the hypothecation of the creditor, the subrogation which I offer him, procures him the same advantage against the co-debtors, as the subrogation of the rights of the creditor could have done, and consequently he has no ground to complain that I have not procured it for him.

When the surety has only become such for one of the debtors in solido and not for the others, after he has discharged the debt, he has only a direct action against the one for whom he has become surety; and can only have the rights and actions against the others which would have belonged to his principal, in case of payment by him: see *supra*. n. 281.

A R T I C L E II.

In what Cases the Surety has an Action against the Principal Debtor, even before he has paid.

[441] The law 10 *Cod. Mand.* only recognises three cases in which a surety may, before discharging the debt, proceed for an indemnity against the debtor for whom he has engaged. *Si pro ea contra quam supplicas, fidejussor seu mandator intercessisti, et neque condemnatus es, neque bona [sua] eam dilapidare [postea] capisse comprobare possis, ut [tibi] justam metuendi causam præbeat; neque ab initio ita te obligationem suscepisse, ut eam possis et ante solutionem convenire; nulla juris ratione, antequam satis creditori pro ea feceris, eam ad solutionem urgeri certum est. d. l. 10.*

The first case stated in this law is, when the surety has been condemned to pay, *si neque condemnatus es.*

According to our *French* practice, the surety is not obliged to wait until there has been a judgment against him; as soon as he is proceeded against by the creditor, he may assign the principal debtor requiring him to discharge it, and he ought even to do so; in default of which the debtor is not liable to acquit the surety from the expences incurred between the first demand and the assignment.

The debtor, whom the surety has not assigned, may even sometimes defend himself from the discharge of what the surety has been condemned to pay, when he had good grounds of defence against

against the demand of the creditor which he might have opposed, if he had been assigned. *Sup. n. 432.*

The second case is, when the principal debtor is in failing circumstances, *neque postea bona sua dilapidare comprobare possis*; in this case the surety, although he has not yet paid, may attach the goods of the principal debtor, to answer the engagement which he has entered into for him.

The third case expressed by this law is, when the debtor has obliged himself to procure the surety, the discharge of his engagement within a certain time; in this case, after the time is elapsed, the surety may proceed against the principal debtor requiring him to produce such discharge, or to advance money sufficient to pay the creditor.

The law says, *neque ab initio*; because, according to the principles of the *Roman* law, this agreement ought to have intervened at the time of the mandate: agreements which were not entered into till after the contract, being merely simple pacts, which, according to the subtilty of the *Roman* law, could not produce an action. As these subtilties have not been received into our law, it is of no consequence whether the agreement intervened at the time of the contract or afterwards.

The law (a) 38. ff. § 1. *Mand.* has a fourth case, *si diu reus in solutione cessabit*: according to this law, although there is no clause, by which the principal debtor has undertaken to discharge the surety from his engagement within a certain time, nevertheless, the surety, whose obligation continues a considerable time, may assign the principal debtor to procure his discharge from it. The law, by the term *diu*, imports a considerable time, but it does not determine it precisely: *Bartholus* fixes it at two or three years; several suppose it to extend ten years from the date of the engagement: nothing can be decided in this respect, it must depend upon circumstances, and be left to the discretion of the judge. *Gl. ad. d. l. 38 (b).*

[442] When the obligation to which a surety has acceded, must from its nature exist a certain time, however long it may be, the surety cannot within that time demand that the prin-

(a) Fidejussor an et prius, quam solvat, agere possit, ut liberetur? Nec tamen semper expectandum est, ut solvat, aut judicio accepto condemnatur, si diu in solutione reus cessabit, aut certe bona sua dissipabit; præsertim si domi pecuniam fidejussor non habebit, qua numerata creditori, mandati actione conveniat.

(b) Lucius Titius Publio Mævio filio naturali domum communem permixsit, non donationis causa, creditori filii obligare; postea Mævio defuncto, relicta pupilla, tutores ejus judicem adversus Titium acceperunt, et Titius de mutuis petitionibus: [Quero, an domus pars, quam Titius] obligandam filio suo accommodavit, arbitrari judicis liberari debeat? Marcellus respondit, an et quando debeat liberari, ex persona debitoris, itemque ex eo, quod inter contrahentes actum esset, ac tempore, quo res, de qua quæretur, obligata fuisset, judicem æstimaturum; est enim earum specierum judicialis questio, per quam res expeditur.

principal debtor should discharge him from it ; for as he knew, or ought to know, the nature of the obligation to which he acceded, he should have reckoned upon continuing obliged during the whole of that time : therefore, the person who has become surety of a tutor for the due execution of his trust, cannot require the tutor, as long as such trust lasts, to discharge him from his engagement, because the obligation which results from the administration of his trust, cannot end before such trust ; for the same reason, a person who has become surety for a husband in favour of his wife for the restitution of her portion, cannot, whilst the marriage continues, compel the surety to discharge him from his engagement, because the obligation from its nature is not to be acquitted until after the dissolution of the marriage.

A R T I C L E III.

Whether the Surety of an Annuity may oblige the Debtor to redeem it.

[443] Either there is an agreement between the surety and principal debtor, that the debtor should be obliged to discharge him from his engagement, at the end of a certain term agreed upon between the parties, or there is not. The first case is less difficult, but still it is not without some apparent difficulty : it may be said, that such agreement is not valid, as it is contrary to the nature of these annuities, the essence of which is that the debtor should never be forced to redeem them ; it is added, that if such agreements were permitted, they would open a door to the frauds of creditors, who, in order to secure a means of compelling the debtor of annuities to redeem them, would only purchase such annuity under the secret condition of having a surety in confidence with themselves, with whom the debtor should agree to redeem the annuity at the end of a certain term ; and by this means creditors would indirectly procure usurious annuities without alienating their principal ; notwithstanding these reasons, *Dumoulin Tr. de Usur. Q. 30.* decides, that this agreement is valid, that the surety may, at the end of a certain term agreed upon, demand from the principal debtor a discharge from his engagement, and that to this effect he should be bound to redeem the annuity ; if it be opposed to this argument that it is of the essence of such annuities, that the debtor cannot be forced to redeem them, the answer is, that it is true, that it is of the essence of these annuities that the debtor cannot be compelled by the creditor to redeem them, but there is nothing to prevent his being compelled by a third person ; the essence of the contract is the entire alienation of the principal, which

which the creditor has paid for the purchase of the annuity; but it is sufficient to constitute this alienation, if the creditor does not retain the power of demanding the principal, and can never oblige the debtor to pay it: it is of no consequence that the debtor may be obliged to do so by a third person. With respect to the other objection founded upon fraud, the answer is, that fraud is not to be presumed; it is true, that the allowance of this agreement may sometimes give an opportunity for the kind of fraud abovementioned, which is an inconvenience; but if, under the pretext of this inconvenience, such an agreement, which in itself is perfectly lawful, was prohibited, there would result a still greater, which is, that persons frequently would not find money of which they have need for their business, for want of finding sureties who would contract an obligation, the duration of which was not limited.

The second case, in which there has been no agreement between the principal debtor and the surety, is attended with a greater difficulty. *Dumoulin, ibid.* decides that in this case, the surety cannot, at the end of any time, however long it be, oblige the principal debtor to redeem the annuity, in order to discharge him from his engagement: for, the nature of the annuity being that it shall always continue until the debtor chooses to redeem it, the surety, who knew the nature of the debt, and has agreed to engage for it, has submitted to contract an obligation of as long a duration as the annuity. “*Non obstat, (says he,) quod diu vel perpetuo remanebit in obligatione, quia hoc est de natura obligationis, et sic prævisum fuit; et tamen fidejussit, et se perpetuo obligavit; simplex autem promissio indemnitatis intelligitur secundum naturam obligationis principalis.*” Thus, he adds, a person who becomes surety for another, who has taken a lease of an estate for the term of twenty-four years, contracts an engagement of a like duration; so the sureties for the administration of a tutelage, so the sureties of a husband for the restitution of the portion, contract engagements which are to last as long as the lease, or the marriage, and which cannot be discharged any sooner; this is the jurisprudence of the parliament of *Toulouse*, as attested by *Catellan, t. 2. l. 5. ch. 21.* Notwithstanding these reasons, it is holden at the Palace (a), that even in the case in which there has been no agreement between the principal debtor and the surety, if the surety is obliged at the request of the debtor, and his engagement has lasted for a considerable time, as for ten years at least, he is entitled to demand that the principal debtor shall liberate him from

(a) The Palace is the place where the courts of justice at *Paris* are holden, and the expression of *Palace* is used figuratively in *France*, as familiarly as that of *Westminster Hall* is in *England*; the distinction referred to is a striking instance of the difference of jurisprudence in different provinces of the same country, respecting subjects which have nothing local in their nature.

his engagement, by redeeming the annuity within a certain time, to be limited by the judge; the reason is, that if the nature of an annuity is to last for ever, unless it be redeemed, it is also the nature of it to be always redeemable; if the surety of a person taking a farm for a long term of years, or of a tutor, or of a husband, for the restitution of the portion, can only be discharged after the expiration of the lease, or after the expiration of the tutelage, or of the marriage, it is because it is of the nature of these obligations not to terminate sooner: therefore, a person who becomes surety for these kinds of obligations, should have computed upon the obligation of his engagements not finishing sooner; but as annuities may be redeemed, and frequently are so, the person who has become surety for the debtor, may have reckoned that the debtor would redeem it, and that his engagement would not be perpetual; therefore, when it continues too long, he ought to be received in his demand against the debtor to discharge him by redeeming the annuity: this is the opinion of *Basnage*, p. 2. ch. 5. *Lacombe* cites an *arrêt*, by which it was so decided.

The right which results from the agreement, that the debtor shall be bound to redeem the annuity within a certain term agreed upon, in discharge of the surety, is not exercised rigorously; therefore, if the surety, after the expiration of the term agreed upon, proceeds against the debtor, to enforce such redemption, the judge ought to give the debtor a prolongation of the term, to satisfy this obligation, when the debtor has not the means of doing it immediately. *Dumoulin, ibid.*

[444] When the surety, who has agreed with the principal debtor, to redeem the annuity within a certain term, has become the sole heir of the creditor of the annuity, or when, being heir for a part, the annuity has fallen by the division to his share, it is plain that he can no longer require the principal debtor to redeem the annuity; for, in this case, his engagement as surety is extinct, since he cannot be a surety to himself; he cannot, therefore, require that the debtor should discharge him from an engagement which no longer subsists, and from which he is liberated.

What if the annuity, for which he was a surety to the deceased, has fallen to the share of his co-heir, or the division has not yet been made? *Dumoulin, ibid.* decides, that if the surety had only become heir of the creditor for a small portion, he may, in either case, exercise his right of obliging the debtor to procure him the discharge from his engagement, by redeeming the annuity; but that if he is become heir of the creditor for a considerable portion, as for a half or a third, he cannot demand such discharge; his reason is, that the surety, by becoming heir for a considerable

considerable portion of the annuity, has also become creditor for a considerable portion of this annuity; and that this quality which he has, or which he had before the division, is repugnant to the right of obliging the debtor to redeem it, in order to procure his discharge from the engagement; as he could have procured such discharge in a much more easy manner, by taking the annuity as a part of his own share.

I cannot perfectly agree with this decision of *Dumoulin*, especially where the whole of the annuity has been allotted to the co-heir of the surety: for, according to the principles of our jurisprudence, respecting the retrospective effects of partitions, which were not so well established in the time of *Dumoulin* as they are at present, an heir is not supposed to have succeeded to the deceased, except as to the part of the effects which has fallen to his share by the division; the surety then is not considered as having ever succeeded to the annuity which has entirely fallen to the share of his co-heir: he has not, therefore, nor is he supposed to have ever had, the quality of creditor of any portion of such annuity; there is nothing then to prevent him exercising the right which he has on his own account, of requiring the debtor to redeem it, in order to procure him a discharge from his engagement: with regard to what *Dumoulin* adds, that it was easy for the surety to procure a discharge from his engagement in another manner, by taking the annuity as his own share, I answer, 1st, that this does not wholly depend upon the surety; his co-heir might have preferred this annuity to the other property, and have required the division to be made by lot; 2dly, even if it had depended upon the surety, I do not see that he would be obliged, for the sake of the debtor, to take this annuity, rather than the other effects of the succession which he might have preferred, and which would have been more advantageous to him.

Before partition, the case is more difficult: I should think that in this case, upon the demand of the surety against the debtor for the redemption of the annuity, it would be proper to wait till after the division; for it is not just that the surety should proceed against the debtor for the redemption, when he may have the expectation of being discharged from his engagement, by the partition upon which it may happen that the annuity may fall to his share.

What if the division had been made, and the annuity had remained in common between the surety and his co-heir? I agree that in this case, the quality of the surety, as heir of the creditor for a portion of the annuity, deprives him of the right to require from the debtor, that he shall re-purchase the whole of the annuity; but why may he not require the debtor to redeem the part belonging to

to his co-heir, declaring his consent that his own share shall continue? I see nothing to prevent his doing so.

The surety ceases to have the right of requiring the principal debtor to redeem the annuity, not only when he becomes proprietor and creditor of the annuity by the title of heir, but likewise when he becomes so by any title whatever, either universal or particular, as if he becomes universal donatary, or legatee of the creditor, or particular donatary, or legatee of the annuity: for he has only the right of demanding the redemption of it, in order to be discharged from his engagement; and he has no longer any occasion to be discharged from it, when he has become proprietor of the annuity by whatever title, since his engagement is then extinct, as no person can be a surety to himself.

If the right of property in the annuity, which the surety has acquired, were only a qualified right, as, if he were donatary, or legatee of it, subject to a substitution, the obligation of his engagement would in this case be rather suspended than extinguished, it would revive when his right to the property had ceased, as by the vesting of the substitution: therefore the surety could not indeed require the redemption of the annuity, during the time that he was proprietor of it; but his right of property having ceased, and his obligation having consequently revived in favour of the person, to whom the property of the annuity has passed, the right of requiring the principal debtor to redeem the annuity, in order to discharge him from his engagement ought likewise to revive, and the time within which he has obliged himself to redeem the annuity, and which had discontinued running, whilst the surety was proprietor of the annuity; will recommence.

But if the surety, who has become proprietor of the annuity, ceases to be so by a voluntary alienation, and not by the dissolution of his right, the obligation of his engagement does not revive, neither consequently does the right of requiring the debtor to redeem the annuity. *Dumoulin, ibid. Quest. 29. n. 246.*

If the surety has himself redeemed the annuity, although he has obtained a subrogation to the rights of the creditor, and is thereby enabled to revive it against the debtor, he may nevertheless, waving the use of this subrogation, recover from the principal debtor, the sum which he paid for such redemption; the reason is, that a mandatory may recover *actione mandati contraria*, every thing that the business in which he was engaged has obliged him to advance, *quidquid ex causa mandati ipse inculpabiliter abest.* (v. *Pand. Justin. tit. Mand. N°. 53. & seq.*) Now, it is the engagement which the surety has entered into, at the request of the debtor, which obliges him to make the redemption, in order to put an end to his obligation;

then this sum *ipfi abest ex causa mandati, et quidem inculpabiliter* ; for the principal debtor cannot disapprove of this expence, since he was under an obligation to redeem the annuity, in order to put an end to the obligation of his mandatory, the surety ; then the principal debtor cannot defend himself from the repetition of this sum. *Dumoulin, ibid. Quest. 30.*

Whether the surety has given money for the redemption of the annuity, or whether by the consent of the creditor he has given him something equivalent to the sum at which it was subject to redemption, he has a right of repetition for this sum against the principal debtor ; for, in both cases, *ipfi ex causa mandati abest.*

Observe, that if the surety had made the redemption of the annuity before the expiration of the time in which the principal debtor was obliged to redeem it, he could not have the repetition of it till after the expiration of such time : even after this time, the claim should not be exercised rigorously ; and when it is made, the judge ought to allow the debtor a reasonable time to procure the money.

We have observed that the surety who has redeemed the annuity, could only have a repetition against the principal debtor, by waving the subrogation under which he is entitled to continue the annuity. Why ? It should seem on the contrary, that the surety having two qualities, *duarum personarum vices sustinens*, he might exercise at once the different rights resulting from these two qualities, that of demanding the continuation of the annuity, as subrogated to the rights of the creditor, and that which he has of his own right to demand, that the principal debtor should redeem the annuity. It would seem that he might do so the rather, as the principal debtor would not appear to suffer any prejudice from it : since, if the surety had not made the redemption, he might have required the debtor to do so ; and notwithstanding this demand of the surety, he would be bound to pay the arrears to the creditor until he had redeemed. Now, it is a matter of indifference to him, whether he pays them to the surety who is subrogated to the rights of the creditor, or to the creditor himself. Notwithstanding these reasons, *Dumoulin, Quest. 29.* decides that the surety who wishes to use the right of subrogation, and to make use of the annuity, cannot also exercise his right of requiring a redemption, because these two rights are absolutely incompatible ; the creditor of an annuity, and the person who chooses to exercise his rights, is in that quality obliged to allow to the debtor the free enjoyment of the principal advanced as long as he pleases, which is directly repugnant to the right of demanding the principal.

Dumoulin,

Dumoulin, Quest. 30. n. 249. gives this temperament to his decision; that if the surety, through an ignorance of law, and not knowing that he could not combine the right of reviving the annuity for his own benefit, with that of demanding the money paid for the redemption of it, had received one or two years' arrears, he would not lose the power of demanding the money paid, in case he offered to renounce the subrogation, and to apply the arrears which he had received to the account of the principal.

ARTICLE IV.

Of the Actions of the Surety against his Co-sureties.

[445] A surety may exercise the actions of the creditor against his co-sureties, when he has had the precaution to obtain a subrogation; but according to the *Roman* laws, he had not in his own right any action against them, even when he had paid the debt: this is the decision of the law 39. (a) *ff. de Fid. L. 11. (b) Cod. d. tit.*

The principle which governed the *Roman* jurists, was that when several persons become sureties for one and the same debtor, they do not contract any obligation with one another; each of them has no other intention than that of obliging the principal debtor; each of them only proposes to undertake the concern of the principal debtor, and not that of his co-sureties, *solius rei principalis negotium gerit, non alter alterius negotium gerit.*

This principle is true, and it may even be said that it is self-evident; but the consequence which the *Roman* jurists deduced from it, that a surety can never, without a subrogation of actions, have recourse against his co-sureties, even if he has paid the whole of the debt for which they were all liable, is too harsh, and which we have not admitted into our jurisprudence; on the contrary our *French* jurists have held that the surety, who has paid the whole debt, may, without a subrogation of actions, recover a proportion of it from each of his co-sureties. This is the opinion of *Argentré* upon article 213, of the ancient custom of *Brittany*; and was retained in the reformation of the custom, *art. 194.*

(a) Ut fidejussor adversus confidejussorem suum agat, danda actio non est; ideoque si ex duobus fidejussoribus ejusdem quantitatis, cum alter electus a creditore totum exsolvet, nec ei cessare sint actiones; alter nec a creditore, nec a confidejussore, convenietur.

(b) Cum alter ex fidejussoribus in solidum debito satisfaciat, actio ei adversus eum, qui non fidejussit, non competit: potuisti sane, cum fisco solveres, desiderare, ut jus pignoris, quod fiscus habuit, in te transferetur: et si hoc ita factum est, cessis actionibus uti poteris. Quod et in privatis debitis observandum est.

This action does not arise from the engagement which the surety has entered into with his co-sureties, as by such engagement they have not contracted any obligation between themselves, according to the principle above established: it arises only in consequence of the payment which he has made of the whole debt, and from the principle of equity, which does not permit that his co-sureties, who were equally liable to the debt, should profit at his expence, by the payment which he has made. This action is not the real *actio negotiorum gestorum*; the surety who has paid the whole of the debt, having paid what he really owed, and being discharged from his own obligation, *proprium negotium gessit, magis quam confidjssorum*; but it is the *actio utilis negotiorum gestorum, quæ non ex subtili juris ratione, sed ex sola utilitatis et æquitatis ratione, proficiscitur*; because, although the surety *ipsius inspecto proposito*, in paying the whole of the debt, was rather transacting his own affair than that of his co-sureties; nevertheless, *effectu inspecto*, having acted for the benefit of his co-sureties, at the same time that he was acting for himself, and having by his payment liberated them from a debt for which they were liable in common with him, it is equitable that they should bear their part of the payment, from which they have derived as much advantage as he has.

There are some authors who go much further, and maintain, that in case of the insolvency of the principal debtor, a surety has an action in his own right against his co-sureties, not only after he has paid the creditor, to recover from them their proportions, but that even before payment, each of the sureties has an action against his co-sureties, to contribute with him to the payment of the sum which they all owe to the creditor: they have even gone so far as to say, that in case of the insolvency of a debtor of an annuity, a surety, who has been such for a considerable time, has an action against his co-sureties, to make them contribute with him to the redemption: v. *Basnage, Tr. of Hypoth. p. 2. ch. 6*, who cites some *arrêts* of the Parliament of *Normandy*, which have so decided, and *Brodeau sur Louet, lettres f. ch. 27*, who also cites an *arrêt* of the Parliament of *Paris*; but I think these authors have gone too far. I agree, that when one of the sureties is sued by the creditor, he has an action against his co-sureties, to furnish their part of the sum demanded; and that in default of so doing, they may each be bound for their part of the expences incurred, after the suit has been notified to them. This action arises from the suit which has been instituted against the surety, and from the principle of equity which does not permit that of several, who are equally bound for one and the same debt, one should be proceeded against rather than the others. Upon this reason of equity is founded the benefit of division

sion among sureties: this same reason of equity which allows a surety, when sued for payment, to require the creditor to divide his action between the sureties, should likewise enable him to require his co-sureties to contribute their respective parts to the payment of the debt; and in default of doing so, to pay the expences incurred, after the notification of the suit to them. He ought to be admitted to make this demand, even where he has renounced the benefit of division, or is excluded from it by the nature of the debt, for which he is surety, as this renunciation and exclusion are only in favour of the creditor.

But, as long as the surety is not sued for payment, he has not any action against his co-sureties to oblige them to contribute with him to the payment of the debt: for the co-sureties, according to the principle above established, not having intended to contract any obligation between themselves, the action that any one of them has against the others, when a suit is instituted against him, is only founded upon a reason of equity, arising from the suit itself; whence it follows, that until he is proceeded against, he has no such right of action; *à fortiori*, the surety of an annuity cannot, in case of the insolvency of the principal debtor, have an action against his co-sureties, to oblige them to contribute with him to the redemption of the annuity; for from what obligation could such a right arise? Where the surety has redeemed it, he can no longer demand any thing else from his co-sureties than the continuation of the annuity, according to the amount of their respective parts: for, as the action which he has against them can only arise from the rule of equity, which does not permit that his co-sureties should have the benefit of this redemption at his expence, and as the co-sureties do not derive any other profit from such redemption than a liberation from the payment of the annuity, they can only be bound to continue the payment of their respective shares of an annuity equal to that from which they have been liberated by the redemption.

A surety who has paid a debt, or redeemed an annuity, has an action against the other principal sureties, and in case of the insolvency of any of them, against the certifiers of such insolvent surety, who, in this respect, represent him: but he has not an action against his own certifiers, who have only engaged for himself; for the certifier is the surety of the surety, *est fidejussor fidejussoris*; the surety, in respect to his own certifier, is as a principal debtor, *est instar rei principalis*.

For the same reason, when the certifier has paid, he has recourse for the whole against the surety whom he has certified.

SECTION VIII.

Of several other kinds of accessory Obligations.

ARTICLE I.

Of the Obligation of those who are called in law *mandatores pecuniæ credendæ*.

[446] A person, by whose order I have lent money to another, is called in law, *mandator pecuniæ credendæ*, *tofo. tit. ff. de Fid. & Mand.*

When you give me an order to lend *Peter* a certain sum of money, this order, which I undertake to execute, includes a contract of mandate between you and me.

According to the principles of a contract of mandate, the mandatory, being obliged, *actione mandati directâ*, to account to the person giving the mandate for every thing which he has *ex causâ mandati*, I am by this contract obliged, in quality of mandatory, *actione mandati directâ*, to cede to you the action which arises from the loan that I have made, in performance of your mandate, and which consequently I have *ex causâ mandati*.

On your part, you are obliged to me, *actione mandati contrariâ*, to reimburse and indemnify me for the sum which I have expended in the execution of your mandate, in lending it by your order to *Peter*. By this obligation, you become answerable for *Peter* to the amount of the debt which he has contracted, by my lending him the money.

In this respect, the *mandatores pecuniæ credendæ* agree with sureties.

They must not, however, be confounded; and there is an essential difference between them.

The obligation of a surety is nothing else than a simple accessory to the obligation of the principal debtor; the cause of which is, that of the obligation of the principal debtor. For instance, if you become surety to me for a sum of money which I have lent to *Peter*, or which *Peter* owes me for the price of any thing which I have sold him, the engagement which you contract is only a simple accession to the obligation of *Peter*; the cause of your obligation, as well as of that of *Peter*, to which you have acceded, is the sale or loan which I have made to him.

It is otherwise with regard to the obligation which you contract in my favour, by giving me an order to lend a certain sum to *Peter*; it is true, that it has the same object as that which *Peter* contracts in

by the loan. The sum of money which you ought to restore to me, *actione mandati contraria*, is not a like sum, but is precisely the same as that which is due to me by *Peter*, and I am not allowed to receive it both from you and from him, according to the rule *bona fides non patitur ut idem bis exigatur*, L. 57. ff. de R. J. But although your obligation has the same object with that of *Peter*, although the sum which is due to me by you and by him be one and the same thing, of which *Peter* is the more principal debtor, as he is the debtor of it for himself absolutely, and you are so rather for him than for yourself; nevertheless, your obligation is not a pure accession to that of *Peter*, it has a different cause from that of the obligation of *Peter*, viz. the contract of mandate between you and me. This is not a simple accessory contract, such as the engagement of a surety, it is a principal contract; your obligation arising from this contract, which is an obligation *ex causa mandati*, has then a different cause from that of *Peter*, who is my debtor *ex causa mutui*.

From these principles, respecting the difference of the obligation of a *mandator pecunie credenda*, from that of a mere surety, arises this distinction; that when a mere surety has discharged the debt for which he has engaged, without requiring, at the time of payment, a cession of the actions of the creditor against the principal debtor, he extinguishes by this payment the debt of the principal debtor, and cannot afterwards have a cession of the actions of the creditor against the principal debtor, which have been extinguished by the payment: for, as his debt is not only a debt of the same thing, but precisely the same debt with that of the principal, to which he has only acceded, the payment which he has made has extinguished the debt of the principal.

On the contrary, where a *mandator pecunie credenda*, by whose order I have lent a certain sum to a third person, as to *Peter*, reimburses me this sum; although he has not required the cession of my actions against *Peter*, the payment which he makes to me only extinguishes his own obligation, and that of *Peter* is not extinguished; I remain, notwithstanding this payment, a creditor of *Peter ex causa mutui*; not indeed so that I could recover for my own benefit the sum due to me, *ex causa mutui*, and which has already been paid *ex causa mandati*, but I remain creditor so far as to be enabled to cede my rights, as such, to the person giving me the mandate, when he shall require it, which I am obliged to do *obligatione mandati directa*, as we learn from the law 28. ff. Mand. *Papinianus ait, mandatorem debitoris solventem ipso jure reum non liberare; propter enim mandatum suum solvit, et suo nomine; ideoque mandatori actiones*

actiones putat adversus reum cedi debere; although he may not have required it at the time of payment.

With the exception of these distinctions, the *mandatores pecunie credenda* nearly agree with sureties. Although the obligation *actione contraria mandati*, which they contract in favour of the person who has lent another a sum of money by their order, is not altogether like the engagement of a surety, a pure accession to the obligation of the debtor, to whom the money was lent, and has *propriam causam*, it is nevertheless, as well as that of sureties, accessory to the obligation of such debtor, and depends upon it; it is only valid inasmuch as the obligation of such debtor is so. These mandatories, as well as sureties, may oppose all the exceptions *in rem*, which could be opposed by the debtor, to whom the thing has been lent by their order (a), *L. 32. ff. de Fidej.* The extinction of the obligation of this debtor, in whatever manner it be made, whether by the real payment of the sum lent, or by compensation, novation, release, confusion (b), extinguishes the obligation of these mandatories, in the same manner as that of sureties. The *Novel 4. § 1.* gives to them as well as to sureties, the exception of discussion. Every thing which we have said of this exception, *supra sect. 6. Art. II.*, is equally applicable to mandatories as to sureties.

To render a person *mandator pecunie credenda*, and consequently responsible to me for the sum of money which I have lent to a third person, by his order, it is necessary that what he says or writes to me should include a real mandate, by which he has charged me to lend this sum, with an intention of indemnifying me for it; but if, having told you in a conversation that I had a thousand crowns to invest in the purchase of an annuity, you should tell me that *Peter* wanted to take up money upon an annuity, and that you thought it would be a beneficial employment of what I have to put out, these terms do not express a mandate, but a mere advice, which does not subject you to any obligation in my favour, according to the rule of law, *consilii non fraudulentum nulla est obligatio, nisi dolus intervenierit. L. 47. ff. de Rig. Jur. (c).*

Observe,

(a) *Ex persona rei, et quidem invito reo, exceptio et cætera rei commoda fidejussori, cæterisque accessionibus competere possunt.*

(b) For the nature of these different modes of discharging obligations, see the several chapters in Part III. where they are particularly considered.

(c) The terms of the law are, *Consilii non fraudulentum nulla obligatio est, cæterum si dolus & calliditas intercesserit, de dolo actio competit.* The two propositions included in this rule, manifestly accord with the dictates of natural justice, and have been, by recent determinations, incorporated into the *English* law; but though the subject underwent very considerable discussion, the direct authority of the civil law was not adverted to, either by the bar or the bench; although such an authority, in respect to a subject not depending upon local institution, would certainly be very far from immaterial.

In

Observe, however, that the rule by which an act of counsel or advice does not oblige the person giving it, only applies if it has been given *bona fide*; therefore, the law adds, *nisi dolus inter-venit*; for if you had any knowledge of the bad situation of *Peter's*

In the first case upon the subject (*Pasley v. Freeman*, 3 T.R. 51.) the allegation that the defendants did encourage the plaintiff to sell certain goods to a third person upon credit, and for that purpose did falsely, fraudulently, and deceitfully, assert, that he was a person of credit, knowing at the same time that he was not so, was holden sufficient to maintain the action. A very correct view of the subject was taken by Mr. Justice Buller, who fully investigated the nature and principles of the action, stating, that the foundation of the action was fraud and deceit in the defendant, and damage to the plaintiff. Fraud without damage, or damage without fraud, gives no cause of action; but where these two concur, an action lies. This opinion was supported by Lord Kenyon and Mr. Justice Aburst; but opposed by Mr. Justice Grose. In the subsequent case of *Haycraft and Creasy*, 2 East. 92. the defendant said to the plaintiff, "I can positively assert, of my own knowledge, that you may safely credit Miss Robertson." There was every reason to believe that this declaration was made with sincerity, and with a perfect assurance of the truth of it, the defendant speaking from a knowledge of circumstances, which had given him that persuasion. Lord Kenyon held that he was answerable, as for a fraud, inasmuch as he did not say, that he believed the matter to be true, or that he had reason so to believe, but in asserting positively, his knowledge of that which he did not know. But the other judges were of an opposite opinion; and Mr. Justice Lawrence said, that in order to support the action, the representation must be made *male animo*.—This last opinion has certainly received the general assent of the profession, and is obviously founded upon the true principles of legal reasoning. An actual intention to deceive was the ground and foundation of the action in the first case; the absence of such intention was consistently held to be an adequate defence in the second.

In the discussion of the last case, some apprehension was expressed of trenching upon the statute of frauds; but that opinion seems to be wholly without foundation. The object of the statute is merely to require that certain engagements and promises shall be evidenced by writing. A promise and engagement is the only subject of the provision; but in the case in question, no promise or engagement is intended; the responsibility arises wholly *ex delicto*; the intention to engage in the one case is manifestly supposed, the absence of such intention is equally manifest on the other; and it would be by no means wise to extend the operation of the statute further than its regular limits, from the apprehension that courts would be unable to distinguish between a defective engagement with intention to contract, and a false representation with the intention to deceive. The objection to the plaintiff's right of recovery, in the case of *Haycraft and Creasy*, would be equally strong, so far as the true principles of the decision are concerned, whether the representation had been written or verbal.

Lord Eldon, in *Evans v. Bicknell*, 6 Ves. 186, was of opinion, that the doctrine laid down in *Pasley v. Freeman*, was in practice and experience most dangerous. He seemed to think the action was allowed upon the principle of its following the practice of courts of equity; but considered it as outstripping equity, inasmuch as in those courts relief could not be had against the answer of the defendant, upon the oath of a single witness. This argument, however, seems to be entirely beside the question; for the court of King's Bench, in deciding upon *Pasley and Freeman*, did not at all profess to act in imitation of any thing previously established in courts of equity; but wholly founded their opinions upon legal reasons and legal authorities. If the abstract proposition is established, that a man who wilfully injures another, by a deceitful and fraudulent representation of the circumstances of a third, shall be answerable for the damage which ensues, few lawyers will entertain the opinion that for ascertaining the fact of a fraudulent intention, and the amount of the consequent damages; the trial by jury is a less judicious and constitutional proceeding than the course of investigation which would be adopted for similar purposes in a court of equity. The reason assigned for the contrary doctrine would apply with equal force to the investigation of any other question of fact.

affairs,

affairs, when you advised me to give him my money, this would be a fraud on your part, which would oblige you, at least in point of conscience, to indemnify me for the loss I might sustain, by the insolvency of *Peter*.

You might even be liable for it in point of law, if I had any manifest proof of your knowledge of it. In like manner we must not regard as a *mandatum pecunie credende*, that which is no more than a simple recommendation. For instance, if you had said to me, *Peter*, our common friend, has occasion for the loan of ten pistoles, I recommend it to you to lend it him; this would not be a mandate, but a simple recommendation, which is not obligatory. *L. 12. (a) § 12. ff. Mandat.*

It would be otherwise, were I to say to you, *Peter* wants ten pistoles, I cannot at present conveniently lend them to him, I will thank you to lend him this sum for me: this is a real mandate.

For a *mandator pecunie credende* to be obliged to indemnify you for the money, which you have lent to a third person by his order, it is necessary that you should confine yourself exactly to the terms of his mandate, *diligenter enim fines mandati custodiendi sunt, L. 5. ff. Mand.* If then you have done any thing else than what is imported by my mandate; as if when I have given you an order to lend a certain sum of money to *Peter*, you have given it to him in purchase of an annuity, or, *vice versa*, if having ordered you to give it to him in the purchase of an annuity, you have given it to him by way of loan, I shall not be obliged in your favour; for, the grant of an annuity and a loan being different things, it cannot be said that you have done what was directed by my mandate,

If I had given you an order to lend *Peter* a certain sum of money, as 500*l.* and you have lent him 600*l.* the sum of 500*l.* directed by my mandate, being contained in that of 600*l.* which you have lent him, according to this rule of law, *in eo quod plus sit, semper inest et minus, L. 110. ff. de R. J.* you in fact have done what was directed by my mandate, and, consequently, I am obliged in your favour, *obligatione mandati contraria*, to the extent of the 500*l.* With regard to the other 100*l.* as you have exceeded the limits of my mandate, I am not obliged for the excess.

Vice versa, if you have lent *Peter* a less sum than that directed by my mandate, I am obliged, for you have executed my mandate in part.

If you did what was in truth directed by my mandate, but have not done it in the manner therein prescribed, I shall not be obliged.

For instance, if the order which I have given you to lend *Peter* a certain sum, directed that you should take from him goods by

(a) Cum quidam talem epistolam scripisset amico suo, rogo te, commendatum habeam Septimum Crispentem amicum meum, non obligabitur mandato: quia commendandi magis hominis quam mandandi causa scripta est.

way of pledge for this sum, and you have not done so; or, if it directed that you should make him pass an obligation before a notary, in order to acquire an hypothecation upon his goods, and you have been satisfied with his note; In all these and other similar cases, I shall not be obliged, because you have not followed my order. *L. 7. (a) Cod. de Fidej.*

Contra vice versa, if I had ordered you to lend *Peter* a certain sum upon his note, without requiring from him either pledges or securities, and you have made him pass an obligation before a notary, for the sum which you have lent him by my order, and have even demanded some pledge or security from him, I cannot complain that you have not confined yourself to the terms of my mandate; for you have done what was included in it, by lending *Peter* the sum I ordered, and as what you have done further cannot be otherwise than advantageous to me, I cannot object to it.

If I had ordered you to lend *Peter* a certain sum, purely and simply, and in lending it to him, you have allowed him a certain term for payment, or given him the power of paying any thing else in its place, I shall not be under any obligation to you; for by giving him this alternative, you have exceeded the limits of my mandate: I am not obliged, *obligatione mandati contraria*, to reimburse you the sum which I ordered you to lend him, except inasmuch as you would be in a condition, after I had done so, to cede to me actions against *Peter*, by which I might have been able, as soon as I pleased, to demand this sum from him, without his being entitled to give me any thing else in its place; and as you have disabled yourself by the term and power which you have granted to *Peter*, from ceding these actions to me, I am not answerable for the loan.

On the contrary, if I had ordered you to lend *Peter* a certain sum, and to allow him a certain term, and you have lent it to him without allowing him such term, I shall be liable to you for this sum, but so that you could not demand it from me, till after the expiration of the term imported by my mandate. I cannot complain of your not allowing the term directed by my mandate to *Peter*; for provided you cannot demand the sum from me till after the expiration of the term, it is indifferent to me whether you might be entitled to demand it sooner from the principal debtor, or not.

(a) Si creditor conditioni mandato adscriptæ, cum pecuniam mutuam daret, in accipiendis hypothecis non paruit; frustra te judicio mandati convenit quando non aliter te obligasse intelligaris, quam si pignoribus contraheretur obligatio.

ARTICLE II.

Of the Obligations of Employers.

Upon this subject, we shall see, 1st, in what sense employers accede to the obligations arising from the contracts of their managers, and in what respect they differ from other accessory debtors; 2d, in what cases this obligation of employers takes place; 3d, the effect of this obligation; 4th, the accessory obligations of employers, arising from the faults of their managers (a).

§ I. *In what Sense Employers accede to the Obligations of the Contracts of their Managers, and in what Respects they differ from other accessory Debtors.*

[447] When a merchant has appointed any person to the management of a commercial concern, or to the command of a vessel, and in like manner when the farmers of the king's revenue have appointed any person to the direction of a particular department; in all the engagements which such manager contracts for the affairs committed to his charge, although he contracts in his own name, he obliges himself as principal, and at the same time he obliges his employer as an accessory debtor; for the employer is considered as having consented beforehand, by the commission

(a) The nature and extent of the responsibility in the cases referred to in this article, is almost the same in the law of *England* as in the law of *France* and *Rome*; and the distinction in the different systems, between considering the obligations as principal or as accessory, refers rather to the name ascribed to the subject, and to the course of judicial proceeding, than to any material difference in the obligation itself. The subject under discussion is the acts of agents, contracting not in the avowed character of agents on behalf of a principal named and recognised as the only responsible person, but themselves contracting, and acting so as to be subject to a personal responsibility, in the business of others generally not named or avowed; the persons on whose behalf the engagement is made are, as well as the agents immediately acting, subject to all the legal consequences of it; but in *England* the obligation is enforced, as arising from the direct and immediate act of the party intended to be charged, whether principal or agent; and in the former case, the character of agent is only a medium of evidence, to shew that the act is imputable to the principal. This was likewise the case with regard to an avowed agent in the law of *France* and *Rome*; but the nominal distinction adverted to in this article, was applied to the obligation of the principal, where the agent acted as on his own account, and thereby incurred a personal obligation.

The extent of the obligation contracted by the principal depends upon the nature of the authority committed to the agent, either by the general nature, or the particular terms, of his appointment. As to the nature of such obligation, see *supra*, No. 79, and the notes. See also the case of *Yates v. Hall*, 2 T. R. 73, in which there is a very elaborate discussion, respecting the right of the master of a ship to bind his owners, by an undertaking, to pay the wages of a seaman agreeing to become an hostage upon the ransom of a vessel; and *Abbott on Shipping*, P. II. c. 3. P. III. c. 5.

which he has given, to all the engagements which the manager might contract for the business to which he was appointed, and to have rendered himself answerable for them.

These employers are a kind of accessory debtors different from sureties, and from *mandatores pecunie credende*; the latter, in acceding to the obligation of the principal debtor, commonly oblige themselves for the business of the principal debtor, and not for their own; on the contrary, the employer, in acceding to the contracts of his managers, does so on account of his own business rather than of theirs. If the manager is, with respect to the engagements which he contracts, regarded as the principal debtor, and the employer as accessory, it is only because the contract was made with the manager; the employer, who frequently knows nothing of the contract, accedes to it, by a general accession which he is supposed to have previously made to the contracts of his manager; but the contracts which the manager makes are rather the business of the employer than his own; and whereas sureties and *mandatores pecunie credende*, are to be indemnified by the principal debtor for the obligations which they contract, it is the employer, on the contrary, who is to indemnify his agent.

§ II. *In what case the accessory Obligation of Employers takes place.*

[448] In order to raise the accessory obligation of employers, the manager must have contracted in his own name, although he was acting for the employer; but when he contracts in his quality of agent he does not enter into any contract himself, it is his employer who contracts by his ministry; *supra*, n. 74. in this case the manager does not oblige himself; it is the employer alone who contracts a principal obligation by the ministry of his manager.

When the manager contracts in his own name, the contract to oblige his employer, must concern the affair to which he is appointed, and the manager must not have exceeded the limits of his commission. *L. 1. (a) § 7. & 12. de Exerc. Act.*

Such

(a) Non autem ex omni causa Prætor dat in exercitorem actionem, sed ejus rei nomine, cujus ibi præpositus fuerit; id est, (si) in eam rem præpositus sit, ut puta, si (ad) onus vehendum locatum sit; aut aliquas res emerit utiles naviganti, vel si quid reficiendæ navis causâ contractum vel impensum est, vel si quid nautæ, operarum nomine, petent.

Igitur præpositio certam legem dat contrahentibus. Quare si cum præpositus navi ad hoc solum, ut vecturas exigat, non ut locet, quod forte ipse locaverat, non tenebitur exercitor; si magister locaverit; vel si ad locandum tantum, non ad exigendum, idem erit dicendum; aut si ad hoc, ut vecturibus locet, non ut mercibus navem præstet, vel contra, modum egressus, non obligabit exercitorem. Sed et, si, ut certis mercibus eam locet, præpositus est, puta legumini, canebus, ille marmoribus, vel aliis materiis locavit; dicendum erit, non teneri, quædam enim naves operariæ, quædam, (ut ipsi dicunt) *ἐργατικæ*,

Such are the contracts of sale and purchase of goods, which are made by a manager of a commercial concern; the purchases made by a captain of a ship to equip or refit his vessel, &c.

The borrowing of money by a manager is likewise deemed to be made on account of the business to which he is appointed, and consequently obliges the employer, when the contract of borrowing contains a declaration of the cause of making it, and when such cause does really relate to the affairs in which the borrower is employed.

For instance, if the master of a vessel after a storm, or an engagement, which has greatly damaged his vessel, puts into a port, and there borrows a sum of money with a declaration that it is to refit his vessel, the merchant who appointed him will be answerable for the money.

It is even decided that the employer is obliged in this case, although the master has misapplied the money, provided the declaration made by the contract was probable, and that the sum borrowed was not much more than was necessary for the business for which it was declared to be intended, *L. 1. (a) § 8 & 9. L. 7. princip. § 1. (b) ff. de Exerc. Act.*

Managers oblige their employers as long as their commission lasts, and it is understood to continue until it is revoked, and the revocation is publicly known.

Although regularly every mandate ends with the death of the person giving it, it has for the benefit of commerce been established, that the commission of these mandatories shall last even after the death of the merchant who appointed them, until it is revoked by the heir or other successor: and in contracting for the business to which they are appointed, they oblige the heir of the merchant

Id est, vectorum dactrices sunt, et plerosque mandare scio, ne vectores recipiant; et sic ut certa regione, et certo mari negotietur; ut ecce sunt naves, quæ Brandubium a Cassiope, vel a Dyrrachio vectores trajiciunt, ad onera inhabiles: item, quædam fluvii capaces, ad mare non sufficientes.

(a) Quid, si mutuam pecuniam sumpserit? an ejus rei nomine videatur gestum? Et Pegasus existimat, si ad usum ejus rei, in quam præpositus est, fuerit mutuatus, dandam actionem: quam sententiam puto veram. Quid enim si ad armandam, instruendamve navem, vel vias exhibendos, mutuatus est? Unde querit Osius, si ad reficiendam navem mutuatus, nummos in suos usus converterit, an in exercitorem detur actio? Et ait, si hac lege accepit, quasi in navem impensurus, mox mutavit voluntatem, teneri exercitorem, imputaturum sibi, cur talem præposuerit: quod si ab initio consilium cepit fraudandi creditoris, et hoc specialiter non expresserit quod ad navis causam accipit, contra esse. Quam distinctionem Pedius probat.

(b) Interdum etiam illud æstimandum, an in eo loco pecunia credita sit, in quo id propter quod credebatur, comparari potuerit. Quid enim (inquit) si ad velum emendandum in ejusmodi, insula pecuniam quis crediderit, in qua omnino velum comparari non potest? Et in summa aliquam diligentiam in ea creditorem debere præstare.

who appointed them, or the vacant succession if he has left no heir.
L. 17. (a) § 2 & 3. L. 11. (b) ff. Instit. Act.

For the same reason the person appointed to the superintendence of a department of finance, obliges the successors of the farmer who appointed him, until his appointment is revoked.

§ III. *Of the Effect of the accessory Obligations of Employers.*

[449] This obligation extends to every thing that is included in the obligation of the manager ; it depends upon it the same as all accessory obligations depend upon the principal obligation to which they accede : therefore this obligation of employers is extinguished when that of the manager is so, whether by payment or novation, *L. 13. (c) § 1. ff. Inst. Act.* or any other manner ; the employer may oppose all the exceptions *in rem, et fins de non recevoir* which may be opposed by the manager ; he cannot oppose any defect in the obligation of his manager arising from any personal incapacity ; for the employer who appointed him cannot impugn his own act and the choice which he has made ; therefore although a person under the age of puberty does not, in contracting, oblige himself, *ne quidem naturaliter*, except so far as *locupletior factus est*, and consequently sureties cannot intervene for him, yet, if a merchant has given the management of his business to such a person, he is liable *institoria actione* to the obligations arising from the contracts made by him, without having any right to oppose his want of age ; *pupillus institor obligat eum qui eum preposuit institoria actione, quoniam sibi imputare debet qui eum preposuit. L. 7. § fin. ff. de Inst. Act.*

[450] With regard to the execution of the *actio institoria*, which arises from the accessory obligation of the employers, there is some difference to be observed between them and sureties.

When several merchants or farmers of the revenue, have appointed any person to the management of their business, to the

(a) Si impubes patri habenti institores heres extiterit, deinde cum his contractum fuerit, dicendum est, in pupillum dari actionem propter utilitatem promiscui usus ; quemadmodum ubi post mortem tutoris, cujus auctoritate institor prepositus est, cum eo contrahitur. Ejus contractus certe nomine, qui ante aditam hereditatem intercessit, etiam si furiosus heres existat, dandam (esse) actionem etiam Pomponius scripsit : non enim imputandum est ei, qui sciens dominum decessisse, cum institore exercente mercem contrahat.

(b) Sed si pupillus heres extiterit ei, qui preposuerat, æquissimum erit, pupillum teneri, quamdiu prepositus manet ; removendus enim fuit a tutoribus, si nollent opera ejus uti.

(c) Meminisse autem oportebit, institoria dominum ita demum teneri, si non novaverit quis eam obligationem, vel ab institore, vel ab alio, novandi animo, stipulando.

conduct of their vessel, or to the direction of a department, *L. 1. § fin. & L. 2. (a) ff. de Exerc. Act.* they have not the benefit of division which is allowed to sureties; this rule should more particularly prevail with us, as, according to our jurisprudence, partners are bound in solido for all engagements relative to their joint concern.

[451] Sureties, and even *mandatores pecunie credenda*, have the benefit of discussion allowed them by the *Novel of Justinian*, of which we have treated, *supra*, § 6. *Art. II.* because they have contracted their obligations rather for the interest of the principal debtor than of themselves; but the obligation which an employer contracts *en contractu*, being an obligation which he contracts for his own account, he has not this benefit of discussion, even if he has already indemnified his agent and remitted him funds to pay; but in this case the creditor ought to grant him a cession of his actions, if required so to do, at the time of payment.

The *Ordonnance of the Marine*, *tit. 8. art. 2.* allows a particular benefit to the owners of ships, by discharging them from engagements contracted by the captain, upon abandoning to the creditors the ship and freight.

§ IV. Of the accessory Obligation of Employers, arising from the Faults of their Managers.

[453] It is not only by contracting that managers oblige their employers; whoever appoints a person to any function, is answerable for the wrongs and neglects which his agent may commit in the exercise of the functions to which he is appointed, *L. 5. § 8. ff. de Inst. Act. (b)*; and if there are several who have appointed him, they are all bound in solido without any exception of division or discussion: for instance, if an inferior collector of the revenue, in exercising his functions in the house of a trader, abuses such trader, or damages his goods, the farmers of the revenue who have appointed him are answerable for such injury, and obliged to pay the damages to which their agent is condemned, saving their recourse against him; because the agent has committed the injury in the discharge of his functions. But if the agent had ill-treated or robbed any person in a matter not connected with his functions, they would not be answerable.

(a) Si plures navem exerceant, cum quolibet eorum in solidum agi potest. Ne in plures adversarios distringatur qui cum uno contraxerit.

(b) Idem (sc. Labéo) ait, si libitinaris, quos Græcè *vaupoδωρσαι*, id est, mortuorum sepulchros vocant, servum polluctorem habuerit, isque mortuum spoliaverit, dandum in eum quasi infortioriam actionem, quamvis & furti & injuriarum actio competere.

This obligation of the employer is accessory to the principal obligation of the agent, who committed the injury.

It is co-extensive with the principal obligation, in respect of the damages due to the person who has suffered the injury; but the employer is only bound civilly, although the person committing the injury may be subject to personal correction; the employers cannot oppose against the action which arises from such injury, either the exception of division; or of discussion; they can only require, upon paying the damages, a cession of the actions of the creditor.

§ V. *Of Heads of Families and Masters.*

[454] Another kind of accessory obligations is that of heads of families, who are responsible for the injuries committed by their minor children and their wives, if they did not prevent them, having it in their power to do so:

They are supposed to have had it in their power to prevent the injury, when it was committed in their presence; if it were committed in their absence, we must judge by circumstances whether the father could have prevented it: for instance, if a child has had a quarrel with his companion, and has wounded him with a sword, although not in the presence of his father, the father may be answerable for the injury, as having had it in his power to prevent it, by not allowing his son to wear a sword, especially if he was naturally quarrelsome.

[455] What we have said of fathers is equally applicable to mothers; when, after the death of their husbands, they have their children under their power; and also to masters, tutors; and to all those who have children under their care.

[456] Masters are likewise answerable for the faults of their servants, when they have not prevented them, having it in their power to do so:

They are even responsible for those which they could not prevent, if the servants committed them in the functions to which they were appointed; for instance, if your coachman in driving your carriage has, through brutality or unskilfulness, caused any damage, you are civilly responsible for it, saving your recourse against him who is the principal debtor.

Fathers and masters are not answerable for the contracts of their children, or servants, unless it can be proved that they had intrusted them with the conduct of some business to which these contracts relate (a):

(a) See 74. note, and note.

For instance, if it was proved that I was in the habit of paying tradesmen for the articles of dress, with which they furnished my daughter, or for the provisions of my house supplied to my cook, a tradesman would be entitled to demand payment from me, for what they might purchase in my name, unless I could prove that I had given him notice not to supply them, or at least, unless what he supplied greatly exceeded what was requisite for the provision of my family; in default of his proving such habit, I should be discharged from the demand by affirming that when I sent my daughter, or my cook to purchase the provisions, I gave them money to pay for them. *Arrêt du Journal des Audiences, Tom. 5.*

SECTION IX. (a)

Of the *pactum constitutæ pecuniæ*. (b)

In the first edition of this work, we omitted to speak of the *pactum constitutæ pecuniæ*, and the engagement resulting from it; which

(a) This section not having been included in the first edition of the original, is numbered separately.

(b) There appears to me to be a striking conformity between the *pactum constitutæ pecuniæ*, as defined in this section, and the *indebitatus assumpsit* of the English law. The *pactum constitutæ pecuniæ*, was a promise to pay, a subsisting debt whether natural or civil; made in such a manner as not to extinguish the preceding debt, and introduced by the prætor to obviate some formal difficulties. The action of *indebitatus assumpsit*, was brought upon a promise for the payment of a debt, it was not subject to the wager of law and other technical difficulties of the regular action of debt; but by such promise the right to the action of debt was not extinguished or varied. In *Slade's case*, 4 Rep. 4. the declaration stated, that in consideration that the plaintiff sold the defendant certain corn, the defendant promised to pay. The jury, by a special verdict, found that there was no other promise except the bargain for the sale. From the discussion which this case received, it is evident that it could not have been before that time usual to proceed in *assumpsit* without a distinct express promise, but the right of action was established; and the case is in a great degree the support of the most ordinary action in modern practice. It will be recollected that the jealousy of the civil law, formerly entertained by the common lawyers in this country, did not extend to the Chancellors by whom writs were framed, that this form of action is of considerable antiquity, though the more extended application of it is to be dated from the case that has been mentioned, and when it is added that the term *nudum pactum*, which we use to import a promise void for want of consideration, is immediately borrowed from the Roman law; the resemblance between the two systems, with regard to this subject, appears to be too strong to be merely accidental.

The preceding observations were made as forming part of a discussion, respecting the question whether an indorser of a bill of exchange, making a promise to pay, after he is legally exonerated, under the apprehension through ignorance of law that he is still liable, is bound by the promise. The conclusion which I have found upon that subject is, that the supposition of such a responsibility is contrary to the true principles of juridical reasoning, however, the opposite doctrine may have been established by authority. The authority of the law mentioned, n. 6. *infra*, was considered as an argument in support of my general conclusion. It is probable that that discussion accompanied by a translation of *D'Aguessau's Dissertation on Mistakes of Law*, may, unless prudential considerations intervene, appear before the public at an earlier period than the present volume.

is in some degree a kind of accessory obligation, since it is added to a primary obligation, and only contracted in order to confirm it.

[1] The *pactum constituta pecunia*, with the Romans, was an agreement by which a person appointed to his creditor a certain day, or a certain time, at which he promised to pay. *Diem solvenda pecunia constituebat* : this results from the terms of the edict *de constituta pecunia*.

The word *pecunia* in this edict, as well as in the Law of the Twelve Tables, and the other edicts of the *prætors*, is used for all kinds of things, as well corporeal as incorporeal, which compose the property of individuals, and which may be the object of obligations. “ *Pecunia nomine non solum numerata pecunia, sed omnes res tam soli quam mobiles, & tam corpora quam jura continentur, l. 222, ff. de verb. sig. Pecunie appellatione rem significari Proculus ait. L. 4. ff. d. tit.* ”

According to our usages, a *pactum constituta pecunia* may be defined simply, an agreement by which a person promises a creditor to pay him.

[2] A person may make this promise to his own creditor, or to the creditor of another.

When a person, by this pact, promises his own creditor to pay him, there arises a new obligation, which does not destroy the former by which he was already bound, but which is accessory to it ; and by this multiplicity of obligations the right of the creditor is strengthened.

In this respect, the right founded upon a personal credit differs from the right of dominion and property ; when I have, by virtue of any title, the dominion and full property of a thing, I cannot further acquire this dominion by virtue of any other title ; *dominium non potest nisi ex una causa contingere. L. 3. § 4. de. acq. poss.*

On the contrary, though I am already creditor of a thing by virtue of one title, I may afterwards become creditor of the same thing, either of the same debtor who obliges himself anew to give it me, or of other debtors.

Paulus, in the law 159. *ff. de reg. Jur.* takes notice of this difference between the right of dominion and the right of personal credit, “ *non ut ex pluribus causis idem nobis deberi potest, ita ex pluribus causis idem potest nostrum esse.* ”

[3] What, it may be asked, is the creditor the better for the new obligation which the debtor contracts in his favour, by the *pactum constituta pecunia* ? It is of use both in point of law, and in point of conscience (*dans l'un & l'autre for*). In point of conscience, (*en ce qui concerne le for interieur*), the more the obli-

gations of the debtor are multiplied, the greater is the violation of good faith in not performing them, and consequently the right of the creditor to expect the execution of them, becomes so much the more strong. In point of law; when the obligation of the debtor, who by this pact promised the creditor to pay, was an obligation purely natural, as with the *Romans* were all those which were only formed by simple pacts, and not accompanied by a stipulation; it is evident that the obligation which the debtor contracted by the *pactum constitutæ pecuniæ*, was very useful to the creditor, as it gave him an action which the former did not. The degree of infidelity which attended the violation of reiterated obligations, induced the prætor to give this action against the debtor, to compel him to accomplish the obligation arising from the pact, *quoniam grave est fidem falli*. L. 1. ff. de pec. const.

When the obligation of the debtor, who by this pact promised the creditor to pay him, was a civil obligation, giving a right of action, the obligation and the action arising from this pact were not indeed necessary; nevertheless, the pact was not entirely useless, and it appears, that it was interposed with respect to civil, as well as with respect to natural obligations. *Debitum ex quacunque causa constitui potest ex quocumque contractu, &c.* L. 1. § 6. & seq. de const. pec. This pact served particularly to determine the time when the payment was to be made, if it was not expressed by the contract; and this determination, according to the principles of the *Roman* law, served *pleno jure*, by the mere lapse of time, to put the debtor *in mora*, when he had not satisfied his obligation: whereas, when no time was fixed, the debtor could only be put *in mora per litis contestationem*.

[4] Even in cases where the creditor would have no need of the pact *constitutæ pecuniæ*, in order to fix the time of payment, on account of its being already fixed and determined by the contract, *Ulpian* decides that the pact may still be of some utility: *Si is qui et jure civili et pratorio debebat in diem sit obligatus, an constituendo teneatur; habet utilitatem, ut ex die obligatus constituendo se eadem die soluturum teneatur.* L. 3. § 2. ff. d. tit.

In order to understand in what this utility could consist, it must be remembered that, according to the principles of the ancient *Roman* law, actions depended upon embarrassing formulæ, the least inattention to which occasioned a failure of the action: it was, consequently, useful to have several actions for one and the same thing, so that if one failed for want of form, recourse might be had to the other: therefore although the obligation was a civil obligation which gave an action to the creditor, the pact *constitutæ pecuniæ*, which gave a new action, was not altogether useless.

[5] *Pacta constitutæ pecuniæ*, the object of which was the determination of a certain day or term, in which a person obliged himself to the creditor to pay him what was due to him, are scarcely in use among us; for the determination of the time in which the payment is to be made, which, according to the *Roman* law, was useful to the creditor, as thereby the debtor might more easily be placed in *morâ*, is not generally, according to the principles of our *French* law, of any utility to the creditor: since with us, whether there be a certain term of payment or not, the debtor can in general only be placed *en demeure*, by a judicial interpellation.

We have, however, among us agreements which may likewise be called *pacta constitutæ pecuniæ*, by which a promise is made to the creditor to pay him what is owing to him; such are those by which the heirs of a debtor pass a new title to the creditor, and oblige themselves to pay him what they owe him in their quality of heirs, the new obligation which results from this act, and which is cumulative to that contracted by the deceased, and is useful to the creditor, as it gives him the right of execution to which he was no longer entitled, by virtue of the original obligation.

With respect to this pact we shall see, 1st, What is necessary to its validity; 2d, Whether it necessarily includes a term within which the payment is to be made; 3d, Whether, by this pact, a person may oblige himself for more than by the former obligation, or for another thing, or in a different manner; 4th, What is the nature of the obligation, which arises from this pact; we shall say something in a 5th § of the pact, by which a promise is made to a creditor to give him a certain security.

§ I. Of what is requisite to a *pactum constitutæ pecuniæ*.

[6] It results from the definition which we have given of the *pactum constitutæ pecuniæ*, that it supposes the pre-existence of a debt, which is promised to be paid to the creditor; therefore, if through mistake I have agreed with you to pay you a certain sum, which I thought was due to you from me or from another, the mistake being afterwards discovered, you cannot demand the payment of it, the pact being void for want of a debt, which was the foundation of it; "*Hactenus constitutum valebit, si quod constituitur debitum sit.*" L. 11. ff. de Const. Pec.

What if I have promised you to pay a certain sum, which I have declared was owing to you, although at the time I knew that I did

not owe it to you? this agreement cannot be valid as a *pactum constituta pecunia*, for want of the debt which ought to be the foundation of it; it is in this case a donation which I intend to make you, and it cannot be valid unless it be accompanied by the forms which the civil law requires for the validity of donations.

[7] When the debt, which was promised to be paid by the *pact constituta pecunia*, was suspended by a condition under which it had been contracted, and which was not yet accomplished; although there is not as yet any debt, yet if, in the sequel the condition is accomplished, the pact will be valid: for, as conditions, when they are accomplished, have an effect which is retrospective to the time of the contract, the debt will be deemed to have existed from the time that it was contracted, and consequently at the time of the *pactum constituta pecunia*, which did not intervene till after. *L. 19. (a) ff. d. tit.*

But if the condition happens to fail, the pact will not be valid; it necessarily includes the condition under which the debt was due, although not expressed.

What if I had expressly promised to pay, even in case the condition should happen to fail? The promise to pay in this case cannot be valid as a *pact constituta pecunia*, for want of a debt which may serve as a foundation for it; it amounts, in case of the failure of the condition, to a donation, which cannot be valid unless the act is accompanied with the regular forms.

[8] It does not matter in what manner the thing promised to be paid by the *pact constituta pecunia* is due; for in whatever manner the thing which I promise to pay you is due, even if it is by a merely natural obligation, it is not a donation, it is a payment, which I promise to make to you, and consequently it is a real *pactum constituta pecunia*.

What if the debt was of a nature expressly disallowed by the civil law? would the *pact constituta pecunia*, by which a person obliged himself to pay it be valid? I think, that if this debt were disallowed by the civil law, not from any defect in its consideration, but from an incapacity of the person who contracted it, and if this incapacity did not subsist at the time of the pact, the pact would be valid.

For instance, if a woman under the power of her husband has borrowed a sum of money, which has not turned out to her benefit. I think that if she becomes a widow, she may legally oblige herself by this pact to pay it: for although this debt is disallowed by

(a) Id quod sub conditione debetur, five pure, five certo die constituitur, eadem conditione suspenditur; ut existente conditione teneatur, deficiente, utraque actio deferat.

the civil law which declares it void, its being due in point of conscience, is sufficient to render the payment of it a real payment, and not a donation; whence it follows, that the agreement by which she promises to pay it, is not a donation but a promise to pay, and consequently a real *pactum constituta pecunia*, which she may lawfully make, as she was then free and capable of entering into an obligation; what we have decided *supra*, n. 395, that this obligation cannot serve as a foundation for that of a surety, may be here offered as an objection to its serving as a foundation for the *pactum constituta pecunia*.

I answer that there is a great difference between the one and the other; the engagement of a surety is only a simple adhesion to the obligation of the principal debtor; such engagement cannot subsist by itself alone; there must be a principal obligation to which it is accessory; now an obligation which the civil law disallows, and which it declares absolutely void, is not susceptible of accession, and consequently cannot serve as the foundation for the engagement of a surety. The right which I acquire against you, when you become surety for any one in my favour, being only an extension of the right, which I have against the person on whose behalf you engage; if I have none against him, (the law declaring his obligation absolutely void,) I can have none against you. The case is not the same with respect to the *pactum constituta pecunia*. If it is said that the obligation which arises from it is accessory to the principal obligation, which a person obliges himself by this pact to discharge, it is only said to denote its being added to the principal obligation; and not in the same sense as when it is said of the engagement of a surety, that it is only a simple adhesion to the principal obligation; it is an obligation which subsists by itself, *propriis viribus*, and even sometimes after the principal obligation has ceased to exist; as we shall see *infra*, by the law 18. (a) § 1. ff. d. tit.

If it is the essence of the *pactum constituta pecunia*, that there shall be a pre-existing debt, it is only because it must have for its object a payment, without which it will amount to a donation: Now, in order that this pact should be regarded as a donation, and that its object should be a payment, it is sufficient that the debt promised

(a) Quod adjicitur EAMQUE PECUNIAM, CUM CONSTITUEBATUR, DEBITAM FU-
ISSE, interpretationem pleniorē exigit. Nam primum illud efficit, ut, si quid tunc debi-
tum fuit, cum constitueretur, nunc non sit, nihilominus teneat constitutum: quia retrorsum se
actio refert. Proinde temporali actione obligatum constituendo, Celsus et Julianus scribunt
teneri debere: licet post constitutum dies temporalis actionis exierit. Quare et si post
tempus obligationis se soluturum constituerit, adhuc idem Julianus putat; quoniam ea
tempore constituit, quo erat obligatio; licet in id tempus, quo non tenebatur.

to be paid should be due in point of conscience, and consequently that there should be a just cause of payment, although it could not be enforced in point of law.

[9] Observe, however, that for the *pact constitutæ pecuniæ*, by which a promise has been made to pay a debt, which the civil law disallows and annuls, to be valid, it is necessary that this debt be not reprov'd for any vice in its consideration, but only for a civil incapacity in the person contracting, and that this incapacity should not continue to subsist at the time of the pact, as in the instance just given; but if the debt promised to be paid by the *pactum constitutæ pecuniæ*, were reprov'd by the civil law on account of its consideration, as a debt incurred for expences at a tavern, by a person residing in the same town, although it be due in point of conscience, and although the payment of it would be valid, nevertheless, the pact by which it was promised to be paid would not, because the badness of the consideration would always subsist; whether the demand is by virtue of the original obligation, or by virtue of the pact, it is still the demand of a tavern debt, which cannot be admitted in a court of justice.

[10] When a debt is only such according to the subtilty of law, such as that resulting from a promise which you have extorted from me by force and violence, and which I am not bound to perform either in point of law, as I can defend myself by an exception, or in point of conscience, it cannot serve as the foundation of a *pactum constitutæ pecuniæ*, "*Si quis constituerit quod jure civili debebat, jure pratorio non debebat, id est per exceptionem; an constituendo teneatur? Et est verum non teneri, quia debita juribus (a) non est pecunia quæ constituta est.*" L. 3. § 1. ff. de pec. const. The reason is, that as it is of the essence of the *pactum constitutæ pecuniæ*, to have for its object the payment of a debt, and a debt of which a valid payment cannot be made, cannot be the object of such a pact; for either the payment is made by error and is not valid, as there is a right of repetition. L. 26. § 3. ff. de cond. indeb. (b) or it is made with the knowledge of the badness of the debt, and in this case it is rather a donation than a payment; according to the rule, "*Cujus per errorem dati repetitio est, ejus consulu. dati donatio est.*" L. 53. de R. jur. Now a donation cannot be the object of a *pactum constitutæ pecuniæ*, this can only be the payment of a debt.

(a) Id est nec jure naturali, nec quoad effectum jure civili, propter exceptionem.

(b) Indebitum autem solutum accipimus, non solum si omnino non debeatur, sed & si per aliquam exceptionem perpetuam peti non poterat: nisi sciens se tutum exceptione, solvit.

[11] It is indeed necessary, as we have hitherto seen, to the validity of a *pactum constituta pecunia*, that at the time of the pact there should be a debt, which by this pact is promised to be paid; but it is not always necessary that the thing which is the object of the pact should exist, for if it had perished by the fault of the debtor, it would continue to be due, as we shall see *infra*, p. 3. c. 6. art. 3. which is sufficient to render valid the pact, by which he promises to pay the thing that no longer exists, and obliges him to pay the value of it. This is the decision of *Julian*: “*Promissor hominis, homine mortuo quum per eum staret quominus traderetur, si hominem daturum se constituerit, de constituta pecuniâ tenebitur ut pretium ejus solvat.*” L. 23. ff. d. tit.

[12] Provided, at the time of the pact, there exists a debt, the payment of which is the object of it, it is immaterial to the validity of the pact, whether the promise of payment be made by the debtor, or any other person for him, *Et quod ego debeo tu constituendo teneberis.* L. 5. § 2. d. tit.

It is not even necessary, that the consent of the debtor should intervene, when another obliges himself on his behalf to pay what he owes. The engagement may be even made against his consent; for in the same manner as one person may pay for another, without or against his consent, L. 53. ff. de solut. (a), he may enter into an obligation for such payment. This is laid down by *Ulpian*, “*Utrum præsentæ debitore, an absente constituat quis parvi refert: Hoc amplius etiam invito; unde falsam putat opinionem Labeonis existimantis si postquam quis constituit pro alio, dominus ei denuntiet ne solvat, exceptionem dandam: nec immerito, nam cum semel si obligatus qui constituit, factum debitoris, non debet eum excusare.*” L. 27. ff. d. tit.

I may indeed, by the *pactum constituta pecunia*, promise to pay what is due from another person; but it is requisite, to the validity of the pact, that I should promise to pay it as due from the person who was really the debtor; if I promise to pay, as supposing myself to be the debtor, when, in fact, I am not so, the pact is not valid. L. 11. ff. dic. tit. (b)

[13] In like manner, as a payment is valid, not only when it is made to a creditor, but also when it is made to another by his order, or with his consent; so a pact is valid, whether the promise be made to the creditor, or to any other, provided it be

(a) Solvere pro ignorante & invito cuique licet, cum sit jure civili constitutum, licere etiam ignorantis invitique meliorem conditionem facere.

(b) Hactenus igitur constitutum valebit, si, quod constituitur, debitum sit, etiam si nullus appareat, qui interim debeat: ut puta, si ante aditam hereditatem debitoris, vel capto eo ab hostibus, constituat quis se soluturum: nam & Pomponius scribit valere constitutum, quoniam debita pecunia constituta est.

made with his consent. It is in this manner that we are to understand what is said by *Ulpian*, *Quod constituitur in rem exactum est, nam utique ut is cui constituitur creditor sit; non quod tibi debetur, si mihi constitutatur debetur. L. 5. § 2.* Provided, as we have said, it be by the consent of the creditor: but if a promise was made to pay any other than the creditor without his consent, the pact would not be valid, even though made to a person to whom a payment would be sufficient. *Si mihi aut Titio stipuler; Titio constitui suo nomine*, says *Ulpian*, *non posse Julianus ait, quod non habet petitionem, tametsi ei solvi possit. L. 7. ff. d. tit.*

§ II. *Whether the pactum constitutæ pecuniæ necessarily includes a Term, within which there is a Promise to pay.*

[14] According to the *Roman law*, as we have already observed, the *pactum constitutæ pecuniæ* generally included a certain day or term, in which a promise was made to pay. This word *constitutum* appeared so manifestly to include the idea of a term of payment, that it was doubtful whether the *pactum constitutæ pecuniæ* could be valid, if no term was expressed; this we learn from *Ulpian*, who thinks, however, that the pacts would be valid, but that a term of at least ten days should be implied. *L. 21. (a) § 1. ff. de tit.*

This decision, in my opinion, ought only to apply where the original contract was also without any term of payment; but if the contract imported a term in which the debt was to be paid, I think that the parties should be presumed in the *pactum constitutæ pecuniæ*, to have agreed upon the time imported by the contract.

This principle of the *Roman law*, that the *pactum constitutæ pecuniæ* ought always to contain a certain term, expressed or understood, in which the payment promised by this pact should be made, does not prevail with us, as we have observed at the beginning of this section.

§ III. *Whether a Person may by the pactum constitutæ pecuniæ oblige himself for more than is due, or for any other Thing, or in a different Manner.*

[15] It is not necessary to the validity of the *pactum constitutæ pecuniæ*, that what is promised to be paid should be

(a) *Si sine die constitutus, potest quidem dici, te non teneri, licet verba edicti late pateant, alioquin et confestim agi tecum poterit, si statim, ut constituisti, non solvas; sed modicum tempus statuendum est, non minus decem dierum, ut exactio celebretur.*

precisely the same sum which is due ; it may be a less sum : “ *Si quis viginti debens, decem constituit se soluturum, tenebitur.*” *L. 13. ff. de pic. const.* Observe, that in this case, although the debtor is only bound *ex pacto constituta pecuniæ in decem*, he is still debtor of the whole sum ; “ *ex pristina obligatione,*” the *pactum (constituta pecuniæ)* not destroying the former obligation, and only acceding to it.

[16] A valid promise may be made by the *pactum constituta pecuniæ*, for a less sum than is due, but not for a greater : and if the pact would only be valid to the amount of the sum due, *v. g. si quis centum aureos debens, ducentas constituit, in centum tantummodo tenetur.* *L. 11. § 1. ff. de t.*

The reason is, that if what was given were more than the sum due, it would not be a payment, but a donation ; now, as we have often said already, the *pactum constituta pecuniæ* can only be valid as a promise to pay, and not as a donation.

For the same reason, if a person had promised by this pact to pay something else, besides the sum which he owes, the pact would only be valid for the sum ; *si decem debeantur, et decem et Stichum constituat, potest dici decem tantummodo nomine teneri.* *L. 12.*

[16] It is not, however, necessary to the validity of the *pactum constituta pecuniæ*, that a person should oblige himself to pay precisely the same thing which is due : he may effectually promise to pay something else, not beyond that which is due, but in the stead of it ; for the payment of another thing in place of that which is due, being valid when the creditor consents to it, as we shall see *infra post.* 3. n. 495. the agreement to pay a different thing, ought in like manner to be valid. This is laid down by *Ulpian* : *An potest constitui aliud quam quod debetur, quaesitum est : sed cum jam placet rem pro re solvi posse, nihil prohibet et aliud pro debito constitui.* *L. 1. § 5. d. tit.*

[17] This pact for paying something else instead of the thing due, may be made not only by the debtor, but by a third person, who promises to pay such other thing for the debtor ; for as a third person may make a valid payment on behalf of the debtor, of a thing different from that which is due, when the creditor consents to it, he may also make a valid promise by this kind of pact.

In this respect, this pact differs from the engagement as surety ; for, as we have seen *supra*, 368, that a surety cannot legally oblige himself for any other thing than that which is due by the principal debtor, *in aliam rem quam qua credita est, fidejussor obligari non potest.* *L. 42. ff. de Fidej.* The reason of this difference is, that an engagement as surety is only a mere adhesion of the surety to the obligation of

of the principal debtor; it cannot therefore have a different object: on the contrary, the *pact constituta pecunia* supposes indeed the pre-existence of a debt, since it has for its object the payment of such debt; but it is not, on that account, a simple adhesion to the principal obligation; it may have a different object from that of the principal obligation; for as the payment of the principal debt, which is the object of the pact, may be made with the consent of the creditor, in something else than the thing due, a promise may be also made by this pact to pay another thing in place of the thing due; in which case, the pact has another object, different from the principal obligation. Another proof that the *pact constituta pecunia* is not a mere adhesion to the principal obligation, is, that the obligation arising from this pact sometimes subsists after the principal obligation is extinguished, as we shall see in the following paragraph.

[18]. A person may oblige himself by this pact in a different manner from the principal obligation: for instance, he may oblige himself to pay in a different place from that imported by the principal obligation: *eum qui Ephesi promisit se soluturum, si constituit alio loco se soluturum, teneri constat. L. 5. ff. de pec. const.*

A person may even oblige himself by this pact, to pay in a shorter time than that imported by the principal obligation: *sed et si ceteriore die constituat se soluturum similiter tenetur. L. 4. ff. d. tit.*

This pact, by which a promise is made to pay in a shorter time, is valid, whether it be made by the debtor, or by a third person, who promises to pay for him, as has been justly observed by *Acursius*, in his gloss upon this law.

This is not contrary to the principle of law which we have adduced *supra* n. 370. *Illud commune est in universis qui pro aliis obligantur, quod si fuerint in duriores causam adhibiti placuit eos omnino non obligari. L. D. § 7. pp. de Fidej.*; for this principle only applies to persons whose obligation is a mere adhesion to that of the principal debtor, such as sureties; but the obligation contracted by the *pactum constituta pecunia*, although its object ought to be the discharge of a pre-existing obligation, is not, as we have already remarked, a simple adhesion to such obligation; since, as we have seen, it may be contracted to give any other thing instead of what is due, provided it be in discharge, and in the place of the thing due; so, provided the pact has no other object than the payment of the debt, a person may oblige himself thereby more strictly than the debtor was obliged by the principal obligation; and consequently, to make the payment in a shorter

shorter time. *Acursius* justly observes upon this law, that one who obliges himself by this pact, and whom he calls *reus constituta pecunie*, is in this respect different from a surety.

I cannot approve of the opinion of *Cujas*, who, in his commentary upon *Paulus ad Ed.* upon this law, censures *Acursius* for having distinguished the *reus constituta pecunia* from a surety, and maintains that the surety may, as well as the *reus constituta pecunia*, oblige himself to pay in a shorter time than the principal debtor, and that there is no passage in the law to the contrary. I answer, that the conclusion that sureties cannot oblige themselves to pay in a shorter time than the principal debtor, is sufficiently warranted by the laws saying in general, that they cannot oblige themselves in *durio rem causam*, for it is evident, that the condition of the person who obliges himself to pay, *hic et nunc*, and without a term, is harder than that of him who is allowed a term: and it is true, that he is obliged for more, since the magnitude of the obligation is estimated not only *quantitate*, but *die, conditione, loco, &c.* Further, the law 16. (a), § 5. *ff. de Fid.* expressly decides, that if a person has become surety, under a certain condition, for a principal debtor, who was obliged to pay at the end of a certain time, and the condition is accomplished before such time, the surety will not be obliged; is not this expressly declaring, that a surety cannot be obliged to pay without a term, when the principal debtor has a term?

[19] The law 8. (b), *ff. de pec. const.* furnishes us with another example of the principle, that a person may oblige himself in a different manner, and more strictly, by the *pactum constituta pecunia*, than by the principal obligation: it decides, that I may stipulate by this pact, that a person may pay to me alone what was, by the principal obligation, payable either to myself, or into the hands of another person, which could not be done by the engagement of a surety; the condition of a surety, who is deprived of the power which the debtor has of paying into the hands of another, being more strict than that of the principal debtor (c). L. 34. *ff. de Fid.*

Cujas,

(a) Stipulatione in diem concepta, fidejussor si sub conditione acceptus fuerit: jus ejus in pendentia erit; ut si ante diem conditio impleta fuerit, non obligetur; si concurreret dies et conditio, vel etiam diem conditio secuta fuerit, obligetur.

(b) Si vero mihi, aut Titio constitueris te soluturum, mihi competit actio. Quod si postea quam soli mihi te soluturum constitui, solveris Titio, nihilominus mihi teneberis.

(c) Hi, qui accessionis loco promittant, in levio rem causam accipi possunt, in deterio rem non possunt. Ideo si a reo mihi stipulatus sim, a fidejussore mihi aut Titio, melio rem causam esse fidejussoris Julianus putat, quia potest vel Titio solvere. Quod si a reo mihi aut Titio stipulatus, a fidejussore mihi tantum interro gem: in deterio rem causam acceptum fidejussorem Julianus ait. Quid ergo si a reo Stichum aut Pamphilum, a fidejussore Stichum interro gem?

Cujas, in the same work, *ad Leg.* 10. & 13. says, that this law ought to be restrained to its particular instance, that is, when it is the debtor himself who promises by this pact to pay to me alone what might have been paid either to me, or into the hands of another, and that a third person could not make this pact, because he cannot any more than a surety oblige himself *in duriores causam*; I think, on the contrary, that as this pact is not a simple adhesion to the principal obligation, a third person may thereby oblige himself *in duriores causam*, as we have already seen.

It remains to observe, that in new titles passed by heirs, by which they oblige themselves to the payment of what was due by the deceased, they may legally, indeed, according to the principles which we have just established, engage for such payment by clauses different from those which are imported by the original title; but, for this purpose, it is requisite that they should intend to make a novation, otherwise, every thing that occurs in the acts different from what was imported by the original title, is supposed to have slipped in by mistake, and is not valid: the presumption being, that the intention of those who pass these acts is to recognise and confirm what was imported by the original title, and not to introduce any new engagement into it. *V. infra n. 744.*

§ IV. Of the Effect of the *pactum constitutæ pecuniæ*; and of the Obligation arising therefrom.

First Principle.

[21] The *pactum constitutæ pecuniæ*, which has for its object the discharge of a pre-existing obligation, does not include any novation; it produces a new obligation, which does not extinguish the former, but accedes to it.

Second Principle.

Although the *pactum constitutæ pecuniæ* does not extinguish the former obligation, it sometimes introduces some changes or modifications; which, however, according to the subtilty of the *Roman law*, was not done *ipso jure*, but *per exceptionem*.

Third Principle.

Although the obligation arising from the *pactum constitutæ pecuniæ* accedes to the former obligation, it is not therefore a pure ad-

Interrogem? Utrum in deteriorem causam acceptus est sublata electione, an in meliorem? Quod et verum est: quia mortuo eo liberari potest.

hesion

hesion to it: it subsists by itself, and sometimes continues to subsist even after the extinction of the former.

Fourth Principle.

The discharge of one of these obligations extinguishes and acquits both.

[22] The first of our Principles has no need of explanation.

The second will be illustrated by the following examples:

First Example.

We have seen in the preceding article, that by the *pactum constitutæ pecuniæ*, a person might promise to pay another thing in place of the sum or of the thing which is due. Suppose a person who owes me thirty pistoles, has promised to give me six gallons of wine, of his own vintage in payment, this pact does not destroy the former obligation: I may, by virtue of that, demand from my debtor the thirty pistoles, and my demand may *ipso jure* be supported; but as I have agreed by the pact, that he may pay me, instead of this sum, six gallons of his wine, he may, *per exceptionem pacti*, on offering such wine, require to be liberated from my demand of thirty pistoles: his former obligation, which was a pure and simple obligation, to pay me precisely the sum of thirty pistoles, receives by the pact a modification, and becomes an obligation of thirty pistoles, with the power of paying the six gallons of wine in its stead.

The creditor being a creditor of the thirty pistoles, by virtue of the former obligation, and creditor of the six gallons of wine, by virtue of the *pactum constitutæ pecuniæ*, he may, if he thinks proper, proceed in the action arising from the pact, and demand the wine; but if the debtor choose rather to pay the money, he may, on offering it, stop the demand of the wine, because, according to the fourth of our principles, the payment of the money, which discharges the former obligation, discharges both.

Second Example.

[23] If, being your debtor in a sum which was payable to you only at your domicil, I have promised you, by the *pactum constitutæ pecuniæ*, to pay it either into your own hands, or into those of your correspondent, in a place less distant, this pact produces in my favour a modification to my obligation; for, instead of being obliged to pay precisely into your hands, and at the place of your domicil, I acquire by this pact the option of paying into the hands of your correspondent, and at a place more convenient for me; which, however, could only be done according to the subtilty

subtily of the Roman law, *per exceptionem*; *si quis pecuniam constituerit tibi aut Titio: etsi stricto jure, priori actione, pecuniæ constitutæ manet obligatus, etiamsi Titio solverit, tamen per exceptionem adjuvatur. L. 30. ff. de pec. const.*

Third Example.

[24] If, by the *pactum constituta pecuniæ*, my debtor has promised to pay me, within a certain term, the sum which he owed me, payable at a shorter term, or without any term, this pact gives a modification to his former obligation; for I am to be understood, as allowing him the term within which he promised to pay me, which ought to preclude me from demanding it sooner, even by the action arising from the former obligation.

It would be otherwise, if a third person promised to pay for you, within a certain term, what you owe me, without a term, or within a shorter one; this pact makes no change in your obligation, and does not prevent my demanding from you before the term specified by this pact, what you owe me; for it is not you to whom I have granted the term specified by the pact, in which you were not a party.

[25] There are, however, cases in which you may indirectly take advantage of a pact by which a third person has promised to pay for you; as if the third person has promised to pay a certain sum for you instead of the thing which you owe; by this pact, although you are not a party to it, you indirectly acquire the power of liberating yourself from your obligation, by the discharge of this sum; for as it is allowed to all persons to pay what is due by another, in the name of the debtor, when they have an interest in making such payment; your having an interest in the payment of the sum, which the third person has by the *pactum constituta pecuniæ* obliged himself to pay, instead of the thing which you owe, is sufficient to entitle you to make the payment of that sum in the name of the third person; and by paying for him, and discharging him from his obligation, you discharge yourself likewise from your own; for, according to the fourth of our principles, the discharge of one of the obligations extinguishes both.

For the same reason, if a third person has by such a pact promised to pay in a different place from that where the debtor was obliged to pay, or if he has promised to pay to the creditor, or into the hands of another person, what the debtor could only pay into the hands of the creditor, the debtor may profit indirectly by this pact, by paying in the manner allowed to the third person, and in his name; and in so doing, you acquit yourself from your obligation,

gation, by which you were bound to pay precisely into the hands of the creditor, or in another place; for according to our fourth principle, the discharge of the obligation arising from the *pactum constituta pecuniæ*, extinguishes the former, and *vice versa*.

[26] We have given examples of the changes and modifications, which the former obligation may receive by the *pactum constituta pecuniæ*, for the advantage of the debtor; it may also receive some for the advantage of the creditor.

For instance, when a person who owed me a sum payable to myself or into the hands of another, promises by the *pactum constituta pecuniæ*, to pay it to me, the former obligation receives by this *pactum* a change for the benefit of the creditor: for, instead of its being an obligation with the power of paying into the hands of another person, it becomes by this pact an obligation which is only payable to myself. *Si mihi aut Titio dare obligatus, postea quam soli mihi te soluturum constituisti, solveris Titio, nihilominus mihi teneris. L. 8. ff. de Const. Pec.* for by this pact you are held to have renounced the power which you reserved by your former obligation, to pay into the hands of *Titius*; therefore the payment which you have made to him is not valid.

It would be otherwise if it was a third person who promised me to make the payment for you; for this pact to which you were not a party, cannot deprive you of the power which you had of paying into the hands of *Titius*.

[27] The following is a case in which the *pactum constituta pecuniæ* introduces some changes in the former obligation, as well on the part of the creditor as on that of the debtor: if the person who was my debtor of two things under an alternative has promised to pay me one of them determinately; this pact introduces, with respect to the creditor, a change in the former obligation, inasmuch as by determining to the thing which he promises to pay, what was before alternative; it gives the creditor the right of requiring this thing determinately, without the debtor's having it any longer in his choice to pay the other. This is laid down by *Papinian*; *Illud aut illud debuit, et constituit alterum, an vel alterum quod non constituit solvere possit, quasitum est? Dixi non esse audiendum, si velit hodie fidem constituta rei frangere. L. 25. ff. d. tit.*

The first obligation receives also in this case a change with respect to the debtor: for, being by this pact confined to the determinate thing, which the debtor has promised to pay, the debtor may acquire a liberation from his obligation, by the extinction of the thing happening without his fault; whereas previous to the pact, his obligation could only be extinguished by the extinction of the two.

[28] Our third principle, that the obligation arising from the *pactum constituta pecuniæ* is not a pure adhesion to the former, is sufficiently evident from what we have said in the preceding articles, that it may have a different object ; as when a person promises to pay another thing, in place of that which is due by the former obligation.

This also appears from the decision, that it may be contracted under stricter conditions ; as when a person promises to pay within a shorter term than that imported by the former obligation, *supra*, n. 18.

What proves still more evidently that the obligation, arising from the pact, is not a simple adhesion to the former obligation; which the party by this pact obliges himself to discharge, and that it subsists by itself, is, that it may continue after the former obligation is extinct.

This is laid down by Ulpian, “ *Si quid tunc debitum fuit cum constitueretur, nunc non sit, nihilominus teneat constitutum ; quia retrosum se actio refert ; proinde temporali actione obligatum, constituendo, Celsus et Julianus scribunt teneri debere, licet post constitutum dies temporalis actionis exierit. Quare etsi post tempus obligationis se soluturum constituerit, adhuc idem Julianus putat, quoniam eo tempore constituit quo erat obligatio, licet in id tempus, quo non tenebatur.*” L. 18. § 1. ff. de Pec. Const.

The *Gloss* gives an instance of this decision, the case in which a seller has, by the *pactum constituta pecuniæ*, promised the purchaser to pay him a certain sum, in reparation of a fault of the article sold, for which he was liable *actione æstimatoriâ* ; according to the decision of this law, the obligation which arises from the pact to pay the sum, continues even after the term of six months, the *actio æstimatoria* limited for ; and a person might, by the pact, have appointed a day of payment, which would not arrive till after the expiration of that time.

In the example which is stated in the *Gloss*, it may be said that although the *actio æstimatoria* be extinguished by the expiration of the term of six months, there remains nevertheless, a natural obligation to indemnify the purchaser, which may be the subject of the payment that the seller has promised to make by the *pactum constituta pecuniæ*.

What if the debt, for the discharge of which the *pactum constituta pecuniæ* has intervened, and which subsisted at the time of such pact, has since been extinguished in some other way than a real or fictitious payment, so that there no longer subsists any obligation, either natural or civil ; will the obligation contracted for the discharge of this

this debt by the *pactum constituta pecuniæ*, continue to subsist? The affirmative is decided by *Paulus* in the law 19. (a) § 2. *ff. de Pec. Const.* where he says that if a father being debtor of a sum which formed a part of the peculium (b) of his son, has promised the creditor to pay him this sum, he continues to owe it by virtue of the pact, although it no longer continue to form part of the son's peculium, and although the obligation *de peculio*, for which he was bound, and in discharge of which he has promised to pay this sum, be extinguished, *licet interierit peculium, non tamen liberatur*.

The following examples are more conformable to our usages:

I have become surety for *Peter* to you, for a sum of a thousand pounds, upon condition that the obligation of my engagement as surety should only continue for two years, at the end of which I should be discharged: before the expiration of two years, and consequently while my obligation subsisted, *James* has promised to pay you this sum for me; he has even assigned for such payment a time which falls after the expiration of the two years; will *James*, after the expiration of the two years, be obliged by the *pactum constituta pecuniæ* to pay you? The reason for doubting is, that as I am only obliged upon condition that my obligation shall not continue longer than two years, and that I should be discharged from it after that time, there no longer subsists in my person any debt, either civil or natural, which could serve as the subject of the payment which he has promised to make for me. The reason of deciding that although my debt be extinct, the obligation of *James* continues to subsist, is, that the time when the *pactum constituta pecuniæ* is interposed is that, at which it is requisite that the debt for which it is interposed should exist: If at that time I actually owed you the sum of a thousand pounds, in discharge of which *James* has promised to pay you a thousand pounds, the pact is valid, and *James* has contracted a binding obligation to you for such sum. It is of no consequence that my debt has since become extinct; that which he has contracted subsists: *si quid tunc debitum fuit, quum constitueretur, nunc non fit tenere constitutum; quia retrorsum se actio refert*. It may be objected,—he is obliged to pay my debt; he cannot pay it, when it is extinct; therefore his obligation cannot subsist; it is reduced to an impossibility: I answer, that it is in fact in payment of my debt that he is obliged to pay you a thousand pounds, and it was

(a) Si pater vel dominus constituerit se soluturum, quod fuit in peculio, non minuetur peculium, eo quod ex ea causa obstrictus esse coeperit; et licet interierit peculium, non tamen liberatur.

(b) A person was not in general susceptible of property during the life of his father; the peculium was certain property excepted from the general rule.

necessary for that purpose that I should owe it to you at the time of making the promise; but after he has contracted the obligation, the payment which he ought to make, and which he does make, is of his own debt; it is only indirectly that it would also amount to the payment of mine, if it still subsisted.

Another instance: a third person engages to pay you thirty pistoles, instead of a certain horse which I owe you; although afterwards my obligation is extinguished by the death of the horse, that of the third person would subsist.

This case is very different from that of a person who was debtor of a certain horse, if he did not choose to give thirty pistoles in his stead. In this case the death of the horse liberates him entirely from his obligation, because the horse constitutes the only debt, the thirty pistoles are only *in facultate solutionis*. But in our case the third person was really debtor of thirty pistoles; it was not even of the horse, but of the money that he was debtor, therefore the death of the horse, which extinguishes my obligation, does not extinguish his.

[29] The obligation arising from the *pactum constitutæ pecuniæ*, may indeed continue after the extinction of the principal obligation, for the discharge of which the pact was interposed: but it is necessary for that purpose, as we have already observed, that the extinction should have taken place by some other means than by a real or fictitious payment; for, according to the fourth of our principles, the payment of either of the obligations extinguishes both.

[30] The reason of this fourth principle is evident: what is promised by the pact *constitutæ pecuniæ*, being promised in payment of the principal obligation, this promise, when it is accomplished, includes a payment of the principal obligation; the payment of what has been promised by the pact is therefore a payment of the two obligations, and consequently extinguishes both the one and the other.

Vice versâ, the payment of the principal obligation extinguishes that of the pact, by rendering the creditor incapable of requiring the discharge of it: for, what has been promised to him by this pact having only been promised, and being due to him for the payment of the principal obligation, if, after having been otherwise satisfied what is due to him by the principal obligation, he should also get paid what was promised him by the *pactum constitutæ pecuniæ*, he would obtain two payments of the principal obligation, which is contrary to good faith: *bona fides non patitur ut bis idem exigatur*. L. 57. ff. de R. I. a person cannot receive two payments of the same debt."

This

[31] This principle, that the payment of one of the obligations extinguishes both is true, not only with respect to a real payment; it is likewise so with respect to fictitious payments, such as compensation, novation, and even a release. The creditor acquiring, by the compensation of a like sum which he owed, the liberation from this sum, is by such liberation paid what was due to him; the creditor in the case of novation is paid the debt of which novation is made, by the new debt contracted in his favour; he cannot then, in these cases, require to be paid what has been promised him by the *pactum constituta pecunia*, as this would be requiring to be paid twice over.

It is the same in the case of a release; for, although in this case he has not received any thing, his having treated the principal obligation as if paid, is sufficient to render him incapable of demanding the payment of it a second time.

[32] Our principle, that the discharge of one of the two obligations extinguishes both, holds good, when the thing promised by the *pactum constituta pecunia* is promised for the payment of all that was due by the principal obligation: when a promise has been made to pay only a part of it, the payment of what was promised by the pact only extinguishes the principal obligation, to the amount of such part; for instance, if being your debtor in twenty pistoles, I have promised, or another has promised to pay fifteen of them within a certain time, the payment of the fifteen pistoles, promised by the pact, will only extinguish the principal obligation to that amount.

[33] It remains to observe with respect to the obligation *constituta pecunia*, that according to the law 16. ff. de Pec. Const. (a) when two persons have promised to pay what is due by a third, they are each liable in solido, in which respect they resemble sureties, *supra*, n. 515. but they have the same exception of division as sureties, when they are solvent, *L. fin. Cod. de Pec. Const. (b)*.

Haleander is of opinion that those, who have promised by the *pactum constituta pecunia* to pay what is due by a third person, have also, like sureties, the exception of discussion, when they are proceeded against for having failed to pay on the day specified, and that they are included in the disposition of the *Novel*, 4. Ch. 1. under the term *arripsumus*, which he renders *constituta pecunia reus*.

(a) Si duo, quasi rei duo, constituerimus, vel cum altero agi poterit in solidum.

(b) Divi Hadriani epistolam, quæ de peculio dividendo inter mandatores et fidejussores loquitur, locum habere, in his etiam qui pecunias pro aliis simul constituunt, necessarium est: æquitatis enim ratio diversas species actionis excludere nullo modo debet.

§ V. Of the Kind of *Pact*, by which a Person promises to the Creditor to give him certain Securities.

[34] There is a kind of *pactum constituta pecunia*, by which a person promises the creditor not to pay him, but to give him certain securities within a specified term, as a pledge, hypothecation, or surety: *Si quis constituerit se pignus daturum, debet hoc constitutum admitti*. L. 14. § 1. ff. de Pec. Const.

The effect of this pact is, that the person who has promised to give certain securities may, in default of doing so, be constrained to the payment of the debt, even before the term in which it is payable; and if it is an annuity, he may be obliged to repay the principal.

[35] A person who has promised by this pact to find a certain other person as surety, is discharged from this obligation, if, before he has satisfied it, or is placed *en demeure* so to do, the person whom he promised to find as surety happens to die, d. L. 14. (a) § 2. the reason is, that his obligation becomes impossible, by the death of this person who can no longer become surety.

It would be otherwise, if the person whom he promised to procure as his surety refused to enter into an engagement as such: *si nolit fidejubere, puto teneri eum, qui constituit, nisi aliud actum est*. d. § The reason is, that it is sufficient to render my obligation valid, if the engagement of the person whom I have promised to procure as surety be a thing possible in itself, although it is by his refusal impossible with respect to me; it is my fault to promise what I could not accomplish. This is conformable to the principles established in n. 136.

(a) Sed et si quis certam personam fidejussorem pro se constituerit, nihilominus tenetur, ut Pomponius scribit. Quid tamen, si ea persona nolit fidejubere? puto teneri eum, qui constituit, nisi aliud actum est. Quid, si ante decessit? Si mora interveniente, sequum est teneri eum, qui constituit, vel in id, quod interest, vel ut aliam personam non minus idoneam fid-jubentem præstet; si nulla mora interveniente, magis puto non teneri.

P A R T III.

Of the different Manners in which Obligations are extinguished, and of the different Fins de non recevoir, or Prescriptions against Debts.

[457] **O**BLIGATIONS may be extinguished in different ways, either by real payment, by consignation, by compensation, (or set off) by confusion, by novation, (or the acceptance of a new engagement) by a release of the debt, or by the extinction of the thing which is due.

Those which have been contracted under a resolutory condition are extinguished by the occurrence of that condition, some by the death of the debtor or of the creditor.

We shall treat of these several modes of extinction, in seven chapters; we shall add an eighth, in which we propose to treat of *fins de non recevoir*, or prescriptions.

C H A P. I.

Of real Payment, and of Consignation.

[458] Real payment is the actual accomplishment of a thing, which a person obliges himself to give or to do (a).

(a) No accident rendering a covenant extremely prejudicial will excuse the performance of it. If a person engage to sustain a bridge for seven years, it is no excuse that the bridge was washed away by an extraordinary flood. *Brecknock Canal Company, versus Pritchard*, 6 T. R. 750. If the tenant of a house engage to repair and pay rent, he must do both though the house is destroyed by fire, *Bullock v. Dommitt*, *id.* 650. The owner of a ship engaged to take a cargo from *Liverpool* to *Leghorn*, and was detained two years by an embargo, and it was held that he was not discharged from his contract, *Hadly v. Clarke*, 8 T. R. 259. The rule laid down in *Dyer*, 33. *Allen*, 26, and referred to in some of the preceding cases is, that when the law creates a duty, and the party is disabled to perform it, without any default in him, and he has no remedy over, the law will excuse him; but when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.

The case of fire often appears to be a hardship, but wherever there is a loss by inevitable accident, an apparent hardship must fall somewhere. Upon an attentive and frequent consideration of the subject, I am perfectly satisfied that the law in this respect is founded upon the principles of natural justice. The grounds of that opinion are contained in Mr. *Famblesque's* valuable notes to his *Treatise on Equity*, B. I. Ch. 5. § 8.

When the obligation is to do something, the real payment of this obligation consists in the performance of what the person has obliged himself to do.

When the obligation is to give something, the payment is the donation and transferring the property of that thing.

It is clear that he who has accomplished his obligation is acquitted and liberated from it; whence it follows, that real payment, which is nothing else than the accomplishment of the obligation, is the most natural manner in which obligations can be extinguished.

We shall see in the two first articles of this chapter, by whom and to whom the payment ought to be made. In the third, what thing ought to be paid, how, and in what state. In the fourth, and fifth, when the payment is to be made, where, and at whose expence. We shall treat in the sixth, of the effect of payment. The seventh will contain rules for the application of payments. Lastly, in the eighth we shall treat of consignation and offers of payment.

A R T I C L E I.

By whom ought the Payment to be made?

[459] When the obligation is to give any thing, the payment consists, as we have said, in an absolute transfer of the property; it follows, that it is essential to the validity of a payment, that it be made by a person who is able to make such transfer.

Whence it also follows, that the payment cannot be valid unless made by the proprietor of the thing, or with his consent; for otherwise, the person who makes the payment cannot transfer the property to the creditor; *nemo plus juris in alium transferre potest quam ipse habet. L. 54. ff. de Reg. Jur.*

Upon this principle, although a certain thing determinately were due from a person deceased, one of several heirs would not by paying it without the consent of the others, according to the subtlety of law, make a valid payment, except for his own proportion, not being the proprietor of those parts which belonged to the others; but as to the effect, the payment would be valid, at least, unless the thing were due under an alternative, or with the liberty of paying something else in lieu of it: because, in any other case, the co-heirs would be bound to ratify the payment which they would have been bound to make: *quod utiliter gestum est, necesse est apud*

apud judicem pro rato haberi. L. 9. ff. de Neg. Gest. Dumoulin, Tract. de Div. & Indiv. p. 2. n. 166 & 169.

If the obligation did not consist *in dando*, but merely in the restitution of something which was detained by the deceased, as if something was lent to him or deposited with him; a restitution by any one of the heirs, in whose possession it might happen to be, would be a valid payment, even *ipso jure*, without the consent of the others: for the co-heirs, not having any right in the thing, would have no interest in preventing the restitution of it, their consent would therefore be superfluous. *Dumoulin ibid.*

[460] For the same reason that a payment would not be valid, if the person making it were not the proprietor, a payment by the very proprietor would be inefficacious, if, through any personal defect, he was incapable of alienating it.

For this reason the payment is not valid, if it is made by a woman under the power of her husband without authority, by a minor under the power of his tutor, or by an interdict. *L. 14, § fin. (a) ff. de Solut.*

[461] Where the payment made by a person who is not proprietor, or who is incapable of alienation, is of a sum of money, or other consumable property, and such property is *bona fide* consumed by the creditor, the payment becomes valid, *d. §*. The reason is, that such a consumption of a sum of money, or any thing similar, is equivalent to a transfer of the property. In effect the actual transfer could not have given the creditor any further advantage: he has used and consumed the thing, as if the entire property had been transferred to him; he is no longer subject to any repetition, either of the sum of money, or any thing else which he has *bona fide* consumed, than if he had become the true proprietor; since the thing which is no longer in his possession, and that without any fraud on his part, cannot be claimed from him; as such a claim could only be maintained against the actual possessor, or a person who had fraudulently ceased to be so (*b*).

[462] Although the payment would not be valid, where the property was not transferred, the creditor, while he retains the possession, cannot claim any other payment; he must

(a) Pupillum sine tutoris auctoritate nec solvere posse palam est, sed si dederit nummos, non sicut accipientis vindicarique poterunt, plane si fuerint consumpti, liberabitur.

(b) The distinctions in the above paragraph would not be applicable, according to the law of England; the payment of money, or the transfer of bank-notes, or negotiable instruments, would, on account of their currency, give a valid indisputable property to the person receiving the payment, (except in some particular cases resulting from the illegality of the contract.) The delivery of articles of any other kind would not give any absolute right, and the person who had received them would be responsible for the value; the act of consumption would not in either case have any effect upon the nature of the right.

suffer an eviction, or offer to restore what he has received to the debtor (a). *L. 94. (b) ff. de Solut.*

[463] It is not essential to the validity of the payment, that it be made by the debtor, or any person authorized by him; it may be made by any person without such authority, or even in opposition to his orders, provided it is made in his name, and in his discharge, and the property is effectually transferred; it is a valid payment, it induces the extinction of the obligation, and the debtor is discharged even against his will. This is what *Gaius* decides in the law 53. *ff. de Solut. Solvere pro ignorante & invito cuique licet, cum sit jure civili constitutum licere etiam ignorantis, invitique meliorem conditionem facere.* The law 23. (c) contains the same decision, and the laws 40. (d) *ff. d. tit.* & 39. (e) *ff. de Neg. Gest.* likewise decide the same thing.

But if the payment was not made in the name of the real debtor, it would not be valid: if a man paid me in his own name a sum of money, believing that he was the debtor, when in fact it was not due from him, but from some other person; this payment would not extinguish the obligation of the real debtor, and I should be obliged to refund what had been paid me by mistake.

This decision holds good according to the subtlety of law, even when you have, in your own name, paid me a sum, which you did not owe me, out of the money and by the orders of the person who really owed it to me. But if I demanded the payment of this sum from my real debtor, he could defend himself by making you a party to the cause, and obtaining a declaration that this sum which you had unduly paid in your own name out of his money, should remain as a payment of what was owing from him to me, and consequently that he should be discharged and acquitted of my demand; but if you instituted the demand against me, in repetition of the sum which you have paid, as having paid it to me without owing it, I may be discharged from your demand, by making my debtor an intervening party, and obtaining a judgment that this sum, having been furnished to you by him, to pay me in his name, should be retained by me in acquittance of his debt.

(a) It may be reasonably added, or an action must have been instituted against him by the original proprietor, and the debtor have refused to indemnify him.

(b) Si is, cui nummos debitor solvit alienos, nummis integris pergat petere quod sibi debeatur, nec offerat quod accepit exceptione doli sum movebitur.

(c) Solutions, vel judicium pro nobis accipiendo, et inviti et ignorantis liberari possumus.

(d) Si pro me solverit quis creditori meo, licet ignorante me; acquiritur mihi actio pignoratitia.

(e) Solvendo quisque pro alio, licet invito et ignorante, liberat eum; quod autem alicui debetur, alius sine voluntate ejus non potest jure exigere, naturalis enim simul et civilis ratio suavit alienam conditionem, meliorem quidem [etiam] ignorantis & inviti nos facere posse; deteriore non posse.

Although

Although the payment of a sum, or any thing which was due to me, would not be valid, when the person who did not owe it to me, has paid it in his own name, yet if he has afterwards himself become debtor of it, the payment is by that circumstance rendered valid, if not *ipso jure*, at least *per exceptionem doli*. L. 25. (a) ff. de Solut.

[464] The principle which we have established, that a payment is valid, by whatever person it may be made, provided it is in the name of the debtor, is not attended with any difficulty, where it has been effectively made, and the creditor has agreed to receive it.

The question, whether a stranger who has no authority for the purpose, either specially or by reason of his situation, nor any interest in discharging the debt, can oblige the creditor to receive the payment, which he offers in the name of the debtor, is attended with more difficulty: the laws above cited do not decide this question; they say indeed that the payment made by any person whatever, in the name of the debtor, liberates the debtor, but they do not decide whether the creditor can or cannot be obliged to receive the payment; we must look for the decision of this question in the law 72. (b) § 2. ff. de Solut. it decides that the offers made to the creditor by any person whatever, in the name and without the knowledge of the debtor, for the payment of his debt, place the creditor *en demeure*. The ordonnance of 1673. t. 5. art. 3. also directs that in case of protest, bills of exchange may be acquitted by any person. From these texts the rule may be inferred, that any tender made to the creditor by any person whatever, in the name of the debtor, will be valid, and place the creditor *en demeure*, when the debtor has an interest in the payment, so as to put an end to any action which the creditor may have commenced, or to stop the accumulation of interest, or to extinguish a right of hypothecation. But if the payment offered would not procure any advantage to the debtor, and would have no other effect than to change his creditor, the offer ought not to be regarded. V. Dumoulin, tr. de Usur. 9. 45.

The principle, that the payment may be made by any other person as well as the debtor, is true with respect to obligations, for giving any thing; for it is immaterial to the creditor by whom the thing is given, provided it be given effectually.

(a) Ex parte hæres constitutus, si decem, quæ defunctus promiserat, tota solvit; pro parte quidem, qua hæres est, liberabitur; pro parte autem reliqua ea condicet; sed si antequam condicet, ei adcreverit reliqua pars hæreditatis, etiam, pro ea parte erit obligatus: et ideo condicentem indebitum doli mali exceptionem obstare existimo.

(b) Sed quid, si ignorante debitore ab alio creditor eum stipulatus est? Hic quoque examinandus est periculo debitor liberatus: quemadmodum si quolibet nomine ejus servum offereat, stipulator accipere nolisset.

With respect to obligations of doing any thing, our rule is not universally applicable ; it takes place where the act which is the object of the obligation is of such a nature that it can be of no importance to the creditor, by whom the thing is done. If I contract with a husbandman to plough my land, another husbandman may discharge the obligation, by ploughing it for him.

It is otherwise where the personal skill and talents of the party contracting the obligation are objects of consideration ; there the obligation can only be discharged by the debtor himself, *L. 31. (a) ff. de Solut.* For instance, if I agree with a painter to take a likeness, he cannot discharge his obligation by causing it to be taken by any other painter, at least without my consent.

A R T I C L E II.

To whom ought Payment to be made ?

[465] The payment in order to be valid should be made to the creditor, or to some person deriving a power from him, or having a quality to receive it.

§ I. *Of Payment made to the Creditor.*

[466] The term creditor is here understood to mean, not only the immediate person with whom the debtor has contracted, but his heirs and all those succeeding to his interest, even under a particular title.

When the creditor has left several heirs, as each of them becomes creditor merely of that particular part for which he is heir, a valid payment cannot be made to any of the heirs of more than his own portion, unless he has been authorized by his co-heirs to receive the whole.

Any person to whom the creditor has transferred his rights whether by sale, donation, legacy (*b*), or any other title whatever, becomes the creditor, upon notice of the transfer being given to the debtor, or by the debtor assenting to such transfer ; and consequently the payment to any such person is valid.

(a) Inter artifices longa differentia est et ingenii, et naturæ, et doctrinæ, et institutionis. Ideo si navem a se fabricandam quique promiserit, vel insulam ædificandam, fossamve faciendam, et hoc specialiter actum est, ut suis operis id perficiat, fidejussor ipse ædificans, vel fossam fodiens, non consentiente fideiussore non liberabit reum.

(b) But according to the law of *England*, a payment cannot be effectually made to a legatee, without the assent of the executor.

On the contrary, the original creditor ceases to have that character upon such notice or assent, and any subsequent payment to him would be nugatory (a).

So, where a person, in whose hands a debt is attached, is condemned to pay the amount to the person suing forth the attachment, that person becomes the creditor, and a payment to him is valid.

[467] A person may sometimes be deemed the creditor, where there was just reason to consider him as such, although another person may in truth be the actual creditor; and a payment made to such ostensible person is as valid, as if it had been made to the real creditor.

For instance, you are in possession of an estate which does not belong to you, to which certain feudal dues and services are attached, the payment to you of such dues, while you are in possession, is valid, although not being the proprietor, you are not properly the creditor; and, when the real proprietor appears and gets possession of the estate, although he was the real creditor of these dues, which have been paid to you, he cannot demand them from the persons who paid you; the payment which they have made to you liberates them. The reason is, that every person being in law reputed and esteemed the owner of the property which he possesses, provided the real proprietor does not appear, these debtors have reason to believe, from seeing you in possession of the seignory, that you were the proprietor of it, and consequently creditor of the dues which they have paid; their good faith ought to render the payment which they made valid; it is the fault of the real proprietor not to have made himself known as such sooner.

For the same reason, the payments made to the person who is in good and lawful possession of a succession, by the debtors of such succession, are valid, although the succession does not belong to him, saving to the real heir, when he shall appear, the right of demanding an account from the possessor of the succession of what he has received (b).

A fortiori, the payments, made by the debtors of a succession to a beneficiary (c) heir, are valid, although he may be afterwards excluded from the succession, by a relation who insists upon being the pure and simple heir: for, if he was not heir, he was at

(a) See Appendix (N^o IV.) to Part I. Chap. 1. § 1. Art. 5. In *Legb v. Legh*, 1 B. & P. 417. it was held that the court would not permit the obligor of a bond to plead payment to the original obligee, after notice of an assignment.

(b) See *Allen v. Dundas*, 3 T. R. 125. in which was held that a payment to an executor, having probate of a forged will, was good against the rightful administrator.

(c) A beneficiary heir was a person appointed to the succession in such a manner, as to be only accountable for his actual receipts; whereas in general, an heir accepting a succession was liable indiscriminately to the obligations of the deceased.

least the administrator of the succession, which gave him a quality to receive.

And *a fortiori*, the payment made to an heir, who is afterwards discharged from his acceptance of the succession, continues valid.

[468] In order to render the payment valid, whether made to the creditor or those succeeding to his rights, the person receiving must have a legal capacity to manage his affairs.

Therefore, if the creditor were a minor, a person under an interdict, or a woman under the control of her husband (*u*), a payment to them would be insufficient, and would not liberate the debtor.

But if the creditor, or his tutor, or curator, under pretence of the nullity of such payment, required to be paid a second time, and the debtor could shew that the creditor had derived an advantage from the money that had been paid, and that the advantage subsisted at the time of the demand; as, by the discharge of debts, or the repair of buildings, the demand should be disallowed, as repugnant to that principle of integrity, which will not permit one man to enrich himself at the expence of another, *neminem æquum est cum alterius damno locupletari*.

Observe, that if the money was employed in purchasing any thing necessary at the time, though it might afterwards be accidentally destroyed, the creditor would still be deemed to retain the advantage at the time of the demand. For if that money had not been so applied, other money must, which has thereby been saved. *Hoc ipso quo non est pauperior factus, locupletior est.* L. 47. § 1. ff. de Solut.

But if the money has been applied in purchasing things which were not necessary, the demand will be allowed if those things do not subsist; and in case of their subsistence, upon abandoning them to the debtor. *d. L. 47. prin. L. 4. (b) ff. de Except.*

[469] A payment made by a debtor to his creditor, in prejudice of the rights of persons by whom the debt has been attached, is valid, so far as respects the creditor, but not as against the persons claiming under the attachment, who may compel the debtor to pay a second time, provided their suit can in other respects be maintained; leaving the debtor to his right of repetition against the creditor.

Although a person be under arrest, his debtors may make valid payments to him as long as there is no attachment

(a) If a legacy be bequeathed to a feme covert, payment of it to her alone is not good, and the executor shall pay it over again to the husband, *Palmer v. Trower*, 1 Ver. 261.

(b) In pupillo, cui soluta est debita pecunia sine tutoris auctoritate, si quaeratur, an doli exceptione summoveri debeat: illud tempus inspicitur, an pecuniam, vel ex ea aliquid habeat, quo petat.

against the debts. *L. 46. (a) § 6. ff. de Jur. Fisc. L. 41. (b) ff. de Solut.*

§ II. *Of those who have Power from the Creditor to receive.*

[470] A payment to any person authorized by the creditor, and on his behalf, is considered as a payment to the creditor himself, and consequently is as valid as if it had been made to him. This is laid down by the law 180. *ff. de Reg. jur. Quod jussu alterius solvitur, pro eo est quasi ipsi solutum esset.*

[471] From this rule it follows :

1st, That the quality or situation of the person authorized to receive is immaterial ; notwithstanding he may be either a minor or a monk, the payment is valid. The reason is, that it is regarded as a payment to the person giving the authority, and it is his person, and not the person to whom the power is given, that ought to be considered, and he should impute to himself the consequences of his choice. *L. 4. Cod. de Solut. (c).*

[472] 2dly, That a payment may be made to a person authorized not only by the creditor, but also by any person having the quality of receiving on his account. For instance, if the creditor is a minor or a married woman, a payment to any person authorized by the tutor or husband is valid. *L. 96. (d) ff. de Solut.*

[473] 3dly, A payment made to a person, authorized by the very creditor, is no further valid than if it had been made to the creditor himself. Such is a payment made to a person authorized by a minor, or an interdict.

[474] A payment to a person under an authority to receive, is only valid if made during the continuance of his authority.

Therefore, if a creditor had given such an authority for a certain time, or during his absence, a payment after that time, or after his return would be ineffectual; because the authority no longer subsists.

So, if the creditor has revoked the authority, a subsequent payment would be invalid : but then the debtor must be apprised of

(a) In reatu constitutus, bona sua administrare potest ; eique debitor rectè bona fide solvit.

(b) Reo criminis postulato, interim nihil prohibet rectè pecuniam a debitoribus solvi ; alioquin plerique innocentium necessario sumptu egebunt.

(c) Nihil interest utrum creditori mutuum pecuniam solveris, an ex ejus voluntate servo numeraveris. Nec enim ex eo quod creditor concessit in satum, priusquam instrumenta redderet, evacuatae obligationis vires reparari queunt.

(d) Pupilli debitor tutore delegante pecuniam creditori tutoris solvit : liberatio contingit, si non malo consilio cum tutore habito factum esse probetur. Sed et interdictio fraudatoris tutoris creditor pupillo tenetur, si cum consilium fraudis participasse constabit.

the

It is a noted question, whether an authority to contract, as, to sell or let, includes an authority to receive the price or hire? *Bartolus* maintains the affirmative, and is followed by *Fachin* II. *contr.* 94. The opinion of *Wifsembach*, *dd. tit. ff. de Solut. n.* 14, who thinks that a power to sell does not include a power to receive the price, at least without circumstances in support of such a presumption appears more plausible. The law 1. § 12. (a) *ff. de Exerc. Act.* appears decisive in favour of this opinion; it is there said, that a person who is only appointed to contract for freighting a vessel, has no power to receive the freight. It cannot be more formally stated, that a power to sell or let does not extend to a receipt of the price.

But there are circumstances under which a person authorized to sell, may be presumed to be authorized to receive the price. For instance, if there happened to be in a town certain public brokers, (*revendeurs*) who were in the habit of taking in goods for sale, and receiving the price from the purchasers, the putting goods into the hands of such persons to be sold, imports an authority to receive the money arising from the sale (b).

§ III. Of Persons to whom the Law gives a Quality to receive.

[478] A payment to those whom the law invests with a quality to receive, on behalf of the creditor, is valid.

The law gives such authority to tutors to receive for their minors; to the curators of interdicts, to receive what is due to these interdicts; to husbands with respect of the property of their wives, cohabiting with them; to the receivers of hospitals, and other public institutions.

These persons have authority to receive, not only the profits of the estates of those who are subject to their administration, but even the principals of their annuities, (c) (when the debtors think proper to redeem them,) without the intervention of any ordonnance of the judge being requisite for that purpose; and the debtors who have paid into the hands of these persons, are altogether liberated and

(a) *Præpositio certam legem dat contrahentibus. Quare si cum præposuit nave ad hoc solum, ut vecturas exigat, non ut locet, quod forte ipse locaverat, non tenebitur exercitor, si magister locaverit; vel si ad locandum tantum, non ad exigendum, idem erit dicendum.*

(b) According to our usages, this presumption would be applied to almost all transactions in the way of trade; and by *Holt, Ch. J. Anon.* 12. *Mod.* 230. He that has power to sell, has power to receive the money; for if a man give power to his servant to sell his horse, he implicitly gives him power to receive the money, and payment to such servant is payment to the owner.

(c) The debtor of annuity was *de jure*, entitled to redeem it upon paying the original purchase money, which is here meant by the principal.

have nothing to apprehend, even if the persons to whom they have paid should become insolvent. The law 25. (a) *Cod. de Adm. Tut.* which required a decree of the judge to protect the debtor, in case of the insolvency of the tutor whom he had paid, is not followed with us.

[479] The mere circumstance of consanguinity, however near, is not a sufficient quality to receive (b).

Therefore, a father has not the quality of receiving what is due to his son, who is not under his power; nor the son what is due to the father; the husband for the wife who is separated from him; and still less the wife for the husband. *L. 22. (c) ff. b. t. l. 11. (d) cod. id. (e)*

§ IV. *Of those to whom the Agreement gives a Quality to receive.*

[480] Sometimes in contracts, whereby one man enters into an obligation to pay something to another, a third person is indicated, a payment to whom shall be considered as made to the creditor; such a person has a capacity to receive for the creditor by the agreement itself; and consequently, a payment to him is as effectual as one to the creditor. Such third persons, to whom it is agreed that the debtor shall pay, are called by the *Roman* jurists, *adjecti solutionis gratia*.

The persons so indicated are usually creditors of the creditor indicating them. For instance, you sell me an estate for 10,000*l.* and it is stipulated by the contract that I shall pay the money in your discharge to a third person, who is your creditor to that amount.

Sometimes the person to whom I direct a payment to be made is not my creditor, but is to receive the money for me as my man-

(a) Sancimus : cretione tutorum & curatorum cum omnis procedente cautela, licere debitoribus pupillorum vel adultorum ad eos solutionem facere : ita tamen ut prius sententia judicialis sine omni damno celebrata hoc permiserit : quo subsecuto, si et iudex [hoc] pronuntiaverit, & debitor persolverit : sequitur hujus modi causam plenissima securitas, ut nemo in posterum inquietetur ; non enim debet quod rite, & secundum leges ab initio actum est, ex alio eventu resuscitari. Non autem hanc legem extendimus etiam in his solutionibus, quæ vel ex redditibus, vel ex pensionibus, vel aliis hujusmodi causis pupillo, vel adulto accedunt : sed si extraneus debitor ex fœneratitia forsitan cautione, vel aliis similibus causis solutionem, facere & se liberare desiderat : tunc enim eam subtilitatem observari censuimus.

(b) In *Dagley v. Tolferry*, 1 P. Wms. 285. 1 Eq. Abr. 300, it was ruled that payment to a father of a legacy left to his son was no discharge, although there were strong circumstances of acquiescence, after the son's coming of age; but where a legacy was given to a father, to be divided between himself and his family, this was held to authorise a payment to the father. *Cooper v. Thornton*, 3 Bro. Ch. 96.

(c) Filius familias patre invito debitorem ejus liberare non potest.

(d) Cum maritum tuum a debitoribus tuis minoris viginti quinque annis constitutus; velut ex causâ tibi debiti aliquas accepisse quantitates, nec tamen te consensum accomodasse, significes nullum tibi præjudicium potuit fieri nisi factans solutionem post majorem gratiam ratam feceris.

datary, or as my donatary if I intended to give it to him. It is such who are properly designated by the *Roman* jurists, *adjecti solutionis gratia*.

[481] The indication may be even made for a different thing, to be paid to the person indicated from that due to the creditor; as if I give you a right to feed your sheep in my field, provided you pay the sum of thirty livres to me in my domicile; or a load of wood of the same value to my tenant, at such a place. In this case, the payment of the wood to my tenant liberates you from the thirty livres which you owed to me. *L. 34. (a) § 2. ff. de Solut. L. 141. (b) § 5. ff. de Verb. Oblig.*

[482] The sum appointed to be paid by the contract to a third person may be less than the debtor is obliged to pay to the creditor.

Hence arises the question agitated in law 98. (c) § 5. *ff. de Solut.* Whether the payment of such smaller sum to the third person liberates the debtor entirely, or only to that extent? The intention of the parties must be inferred from circumstances; but unless the contrary evidently appears, the presumption is that the intention of the parties was, that the payment of this less sum to the person indicated should only liberate the debtor to the extent of that sum.

[483] An appointment may be made to pay to a third person, at a different time and place from those agreed upon for payment to the creditor.

For instance. I may agree that you pay me a sum in my domicile at *Orleans*, or to my banker at *Paris*; so I may agree that you shall pay me such a sum either to myself, at the time of a certain fair, or to such a person after the fair; *vice versa*, I may agree, that you shall pay me such a sum either to myself, at the time of the

(a) *Stipulatus sum decem mihi aut hominem Titio dari: si homo Titio datus fuisset, promissor a me liberatur; et antequam homo daretur, ego decem petere possum.*

(b) *Cum mihi aut Titio stipulor, dicitur aliam quidem rem in personam meam, aliam in Titii designari non posse; veluti mihi decem aut Titio hominem, si vero Titio ea res soluta sit, quæ in ejus persona designata fuerit; licet ipso jure non liberetur promissor, per exceptionem tamen defendi possit.*

(c) *Qui stipulatus sibi aut Titio, si hoc dicit, si Titio non solveris, dari sibi: videtur conditionaliter stipulari. Et ideo etiam sic facta stipulatione, MIHI DECEM, AUT QUINQUE TITIO DARI? Quinque Titio solutis, liberabitur reus a stipulatore. Quod ita potest admitti, si hoc ipsum expressim agebatur, ut quasi pœna adjecta sit in persona stipulantis, si Titio solutum non esset. At ubi simpliciter sibi aut Titio stipulatur, solutionis tantum causa adhibetur Titius; et ideo quinque ei solutis, remanebunt reliqua quinque in obligatione. Contra si mihi quinque, illi decem stipulatus sum; quinque Titio solutis, non facit conceptio stipulationis, ut a me liberetur, porro si decem solverit, non quinque repetet, sed mihi per mandati actionem decem debebuntur.*

fair,

fair, or to another person before that time. *L. 98. (a) § 4 & 6. ff. de Solut. L. 141. (b) § 6. de Verb. Oblig.*

[484] The indication of paying to a third person may depend upon a condition, although the obligation itself is pure and simple; but if the obligation itself depended upon a condition, the indication, though it were made purely and simply, or upon a different condition, would necessarily depend upon the same condition as the obligation; for a payment can only be made to the person indicated, where something is due, and nothing can be due if the obligation is contracted upon a condition which does not subsist. *L. 141. (c) § 7 & 8. ff. de Verb. Oblig.*

It is otherwise with respect to a term for payment; as the payment may be effectively made within the term, an indication to pay to a third person is not necessarily subject to the term allowed for payment to myself; therefore, I may agree to permit my debtor to pay to a third person, provided it is paid within a month; although I give him two months for a payment to myself, *d. L. 98. § 4.*

[485] The payment is effectively made to the person indicated not only by the debtor himself, but by any other on his behalf. *L. 59. (d) vers. & si a filio ff. de Solut.*

(a) *Mihi dare decem pure, aut Titio calendis, vel sub conditione, aut mihi calendis Januariis, Titio Februariis, utiliter stipulor. Quod si mihi calendis Februariis, Titio calendis Januariis; potest dubitari. Sed rectius dicitur utiliter stipulatum; nam cum in diem sit ea quoque obligatio, etiam mihi solvi potest ante Februarias; igitur et illi solvi poterit.*

Mihi Romæ aut Ephesi Titio, dari stipulor, an solvendo Titio Ephesi a me liberetur, videamus? Nam si diversa facta sunt ut Julianus putat, diversa res est, sed cum prævalet causa dandi liberatur: liberaretur enim et si mihi Stichum illi Pamphilum dari stipulatus essem et Titio Pamphilum solvisset. At ubi merum factum stipulor, puta insulam in meo solo ædificari aut in Titii loco; nunquid si in Titii loco ædificet, non contingat liberatio; nemo enim dixit facto pro facto soluto liberationem contingere? Sed verius est liberationem contingere: quia non factum pro facto solvere videtur, sed electio promissoris completur.

(b) Tempora vero diversa designari posse, veluti; *MIHI KALENDIS JANUARIIS AUT TITIO KALENDIS FEBRUARIIS? Imo etiam ceteriorem diem in Titii personam conferri posse: veluti MIHI KALENDIS FEBRUARIIS, TITIO KALENDIS JANUARIIS? Quo casu talem esse stipulationem intelligemus, si TITIO KALENDIS JANUARIIS NON DERIS, MIHI KALENDIS FEBRUARIIS DARE SPONDES?*

(c) Sed rursus mihi quidem pure, aut Titio sub conditione stipulari possum. Contra vero, si mihi sub conditione, aut Titio pure: inutilis erit tota stipulatio, nisi in meam personam conditio extiterit, scilicet [quia] nisi, quod ad me, rem acceperit obligatio, adjectio nihil potest valere. Hoc tamen ita demum tractari potest, si evidenter apparet pure Titii persona adjecta. Alioquin cum stipulor *SI NAVIS EX AFRICA VENERIT, MIHI AUT TITIO DARI SPONDES?* Titii quoque persona sub eadem conditione adjici videtur.

Ex hoc apparet si diversa conditio in meam personam, diversa in Titii, posita sit, nec in meam personam extiterit conditio, totam stipulationem nullius momenti futuram: extante vero mea conditione, si quidem Titii quoque conditio extiterit, poterit vel Titio solvi: si vero in illius persona defecerit, quasi non adjectus habebitur.

(d) Et si a filio familias mihi aut Titio stipulatus sim; patrem posse Titio solvere quod in peculio est: scilicet si suo non filii nomine solvere velit dum enim adjecto solvitur, mihi solvi videtur. Et ideo si indebitum adjecto solutum sit, stipulatori posse condici Julianus putat; ut nihil intersit jubeam [te] Titio solvere, an ab initio stipulatio ita concepta sit.

[486] The right which the debtor has to make as valid a payment to the person indicated as to the creditor, is transmissible to the heirs of the debtor; they have this right, even if mention of it had not been made in the new title which they have passed; for it is never presumed that a new title was intended to vary from the original title.

[487] Regularly, the payment can only be made to the person actually indicated by the contract, and not to his heirs, or other representatives. *L. 55. (a) ff. de Verb. Oblig. L. 81. (b) ff. de Solut.*

Nevertheless, where the seller appoints a purchaser by the contract of sale to pay the price to one of his creditors, the payment may be effectively made, not only to the creditor himself, but to his heirs, and others succeeding to his rights. The reason is, that in such indication, it is not so much the person indicated, as his quality of creditor that is considered, in consequence of the interest which the seller has in the credit being discharged, and of that which the purchaser has to be subrogated to the rights and hypothecations of the creditor.

[488] A payment to the person indicated ceases to be valid, when he has changed his state. Therefore, if the person indicated by the contract has afterwards ceased to have a civil existence, I cannot make a valid payment to him. *L. 38. (c) de Solut.* although the creditor could have indicated to me a person who at the time of the contract was civilly dead; and it is in this sense that the law 95. (d) § 6. *d. t.* which appears to decide the contrary, ought to be taken. (*v. Cujas, in Comment. ad Papin ad h. L.*) The reason of this difference is, that it may be presumed that the creditor would not have chosen the payment to be made to such person, if he had foreseen that he was to lose his civil existence. But if, at the time of the contract, he had lost it, and the creditor knew that he had done so, the assent of the creditor, that the payment shall be made into his hands, notwithstanding he does not enjoy a civil state, cannot admit of any doubt.

(a) Cum quis sibi aut Titio dari stipulatus est, soli Titio, non etiam successoribus ejus recte solvitur.

(b) Si stipulatus sim MINI aut Titio dari, si Titius decesserit, heredi ejus solvere non poteris.

(c) Cum quis sibi aut Titio dari stipulatus sit; magis esse ait, ut ita demum recte Titio solvi dicendum sit, si in eodem statu maneat, quo fuit cum stipulatio interponeretur; ceterum si in adoptionem siue in exilium ierit, vel aqua & igni ei interdictum, vel servus factus sit; non recte ei solvi dicendum, tacite enim inesse hæc conventio stipulationi videtur, si in eadem causa maneat.

(d) Usumfructum mihi aut Titio dari stipulatus sum: Titio capite diminuto, facultas solvendi Titio non intercedit: quia & sic stipulari possumus, MINI aut Titio, cum capite minutus erit, dari?

The same may be said of a person of whom an indication has been made, and who afterwards becomes an interdict, or subject to the power of a husband, or a bankrupt. In all these cases, the creditor cannot make a valid payment, the presumption being, that if these accidents were foreseen, such person would not have been indicated,

[489] A person to whom the creditor has indicated the payment to be made by the agreement itself, is very different from one who has merely an authority from the creditor to receive. The power of paying to a person having a simple authority ceases by a revocation of the authority notified to the debtor, which the creditor may make at pleasure. The reason is, that such a right of payment being founded merely upon the procuration of the creditor, which, like every other procuration, is revocable, it follows, that as the procuration is determined by the revocation, the right founded upon it must determine also.

On the contrary, the right of paying to the person indicated by the agreement being founded upon the agreement itself, of which it constitutes a part, and which cannot be derogated from, but by mutual consent, the creditor cannot deprive the debtor of it, and the debtor, notwithstanding any prohibition of the creditor, may according to the law of the agreement, pay to the person indicated: this is laid down by the law 12. (a) § 3. and law 106. (b) ff. de Solut.

Nevertheless, if the creditor alleges that he has reasons for objecting to the payment being made to this person indicated by the contract, and the debtor has no interest in paying to that person; rather than to the creditor himself, or any other indicated by him, in lieu of the person indicated by the contract; to insist upon paying to the person indicated would be a degree of ill-humour and unreasonable obstinacy on the part of the debtor, which justice must disapprove.

[490] By the *Roman* law, the power of paying to the person indicated by the agreement, ceased, when upon the demand of the creditor, there intervened a *litis contestatio*. L. 57. (c) § 1. This being only founded upon a subtilty, I do not think it ought to be followed in our law.

(a) Alia causa est, si mihi proponas stipulatum aliquem sibi, aut Titio, hic enim et si prohibeat me Titio solvere, solvendo tamen liberabor; quia certam conditionem habuit stipulatio, quam immutare non potuit stipulator.

(b) Aliud est, jure stipulationis Titio solvi posse; aliud postea permissu meo id contingere. Nam cui jure stipulationis recte solvitur, ei etiam prohibente me recte solvi potest: cui vero alias permisero solvi, ei non recte solvitur, si priusquam solveretur, denuncia- verim promissori, ne ei solveretur.

(c) Item si MINUS AUT TITIO stipulatus fuero dari, deinde petam, amplius Titio solvi non potest, quamvis ante litem contestatam possit.

[491] There is no doubt but that a payment of part of the debt to the creditor himself does not destroy the power of paying the remainder to the person indicated. *L. 71. (g) de Solut.*

§ V. *In what Manner may a Payment to a Person, who has neither Power nor Quality to receive, be rendered valid?*

[492] A payment to a person who has neither quality nor power to receive, becomes valid,

1st, By a subsequent ratification and approbation by the creditor, *L. 12. (b) § 4. ff. de Solut. L. 12. (c) cod. d. t. L. 24. (d) ff. de Neg. Gest.*

Ratifications, having a retrospective effect, according to the rule *ratihabitio mandato comparatur, d. L. 12. § 4.* the payment is regarded as valid from the time of making it. Therefore, if a person engages as surety for my debtor; with a condition that his engagement shall continue no longer than the first of *January*, 1750, at the end of which time he shall be, *pleno jure*, discharged and acquitted; the payment by him in the course of the year 1749, to a person who had no power from me, will be valid, and he will have no right to demand a repetition, although I did not ratify the payment till 1750, the time in which he would have ceased being my debtor, if he had not paid; for by the retrospective effect of my ratification, the payment becomes valid, from the day on which it was made; and it was made at a time when his obligation subsisted. *L. 71. (e) § 1. ff. de Solut.*

Upon the same principle, if I owe a hundred pounds to *Peter* and *Paul*, as creditors in solido (*f*), and I pay that sum in the first place to a person who receives it for *Peter*, without any power from him, and afterwards pay it a second time to *Paul*, the validity of

(a) Cum decem mihi aut Titio dari stipulatus, quinque accipiam; reliquum promissor recte Titio dabit.

(b) Sed etsi non vero procuratori solvam, ratum autem habeat dominus, quod solutum est: liberatio contingit, rati enim habitio mandato comparatur.

(c) Invito vel ignorante creditore qui solvit alii, se non liberat obligatione. Quod si hoc, vel mandante, vel ratum habente eo fecerit, non minus liberationem consequitur, quam si eidem creditori solvisset.

(d) Si [ego] hac mente pecuniam procuratori dem, ut ea ipsa creditoris fieret; proprietas quidem per procuratorem non acquiritur, potest tamen creditor, etiam invito me, ratum habendo, pecuniam suam facere; quia procurator in recipiendo creditoris dentat negotium gessit; & ideo creditoris ratihabitione liberor.

(e) Si fidejussor procuratori creditoris solvit & creditor post tempus, quo liberari fidejussor poterit, ratum habuit: tamen quia fidejussor, cum adhuc ex causa fidejussionis teneretur, solvit, nec repetere potest, nec minus agere adversus reum mandati potest, quam si tum presenti dedisset.

(f) As to the nature of obligations in solido among several creditors, *v. ante n. 258.*

the

the payment made to *Paul* will depend upon *Peter's* ratification; the first payment will be valid, if ratified by *Peter*; the second void, as being the payment of a debt already discharged; if *Peter* does not ratify the first, it will be void, and the second good. *L. 58. (a) § 2. ff. d. t.*

[493] The second case in which a payment to a person who had not a quality to receive becomes good, is, when the payment has eventually turned to the profit of the creditor, *L. 28. (b) L. 34. (c) § 9. de Solut.* As if it had served to liberate him from a debt. *(d) L. 66. (e) v. sed exceptione, ff. d. t.*

The third case is, if the person to whom payment has been made, becomes heir, or has succeeded to any other title of the creditor. *L. 96. (f) § 4. d. t.*

ARTICLE III.

What ought to be paid, how, and in what State.

§ I. Can one Thing be paid for another?

[494] Regularly, a payment can only be made of the thing due; and a debtor cannot oblige his creditor to accept of any other thing, in lieu of what he owes him. *L. 16. (g) cod. de Solut.*

By the *Novel 4, ch. 3*, a debtor, who has neither money, nor goods by which money may be raised, may oblige his creditor to

(a) Et si duo rei stipulandi sunt, quorum alterius absentis procuratori datum antequam is ratum haberet, interim alteri solutum est, in pendentem est posterior solutio, ac prior. Quippe incertum est, debitum an indebitum exegerit.

(b) Debitores solvendo ei, qui pro tutore negotia gerit, liberantur si pecunia in rem pupilli pervenit.

(c) Si prædo id, quod a debitoribus hereditariis exigerat, petenti hereditatem restituerit; debitores liberabuntur.

(d) In England, this decision would not be allowed. Under many circumstances, a ratification would be presumed, which would bring the case to the preceding point; but my debtor has not a right against my will to discharge himself by a payment to my creditor.

(e) Si pupilli debitor, jubente eo sine tutoris auctoritate pecuniam creditori ejus numeravit: pupillum quidem a creditore liberat, sed ipse manet obligatus; sed exceptione se queri potest. Si autem debitor pupilli non fuerat, nec pupillo condicere potest, qui sine tutoris auctoritate non obligatur nec creditore, cum quo alterius jussu contraxit: sed pupillus in quantum locupletior factus est, utpote debito liberatur, utili actione tenebitur.

(f) Cum institutus deliberaret, substituto pecunia per errorem soluta est; ad eum hereditate postea devoluta, causa conditionis evanescit; quæ ratio facit ut obligatio debiti solvatur.

(g) Eum, a quo mutuam sumpsisti pecuniam, in solutum nolestem suscipere nomen debitoris tui, compelli juris ratio non permittit.

receive

receive estates upon a valuation to be made, unless the creditor prefers finding a purchaser (a).

[495] The debtor is not only without any right of obliging his creditor to receive any thing different from what is due, as a payment, but even if the creditor, by mistake, receives some other thing, upon a supposition of that being the thing which is actually due, the payment would not be valid, and the creditor may, upon offering to return what he has so received, demand what is really due. This is decided by *Paulus*, in l. 50, ff. *si quum aurum tibi promissum tibi ignoranti quasi aurum es solverem non liberabor*.

If the creditor consents to receive any other thing in discharge of what was due to him, it is doubtless a valid payment (b), L. 17. (c). *cod. de Solut*, unless there was a right of restitution against this payment, in the case of insufficiency in value (*lesion*) on account of the minority of the creditor, who may have imprudently given his consent, or on account of fraud, &c. L. 26. (d) ff. *de lib. leg*.

[496] The debtor may oblige the creditor to receive some other thing, when there is an express power for the purpose, whether by the original contract, or by a subsequent agree-

(a) But this is not observed in *France*.

(b) In *Pinnel's case*, 5 Co. 117, an action of debt was brought upon an obligation of 26*l.* with condition to pay 8*l.* 10*s.* on the 21th of *November*, 1600. The defendant pleaded that he, at the instance of the plaintiff before the day, viz. 1st *October*, paid the plaintiff 5*l.* 2*s.* which he accepted in full satisfaction of the 8*l.* 10*s.* And *per totam curiam*, the payment of a less sum at the day in satisfaction of a greater cannot be a satisfaction for the whole; for by no possibility can a smaller sum be a satisfaction for a larger; but the gift of a horse or a robe, &c. in satisfaction, is good; for it shall be intended that the horse, &c. was more beneficial to the plaintiff, otherwise he would not accept it in satisfaction: but when an entire sum is due, the acceptance of part of it cannot by any intentment be a satisfaction. But in the case at bar, it was resolved, that the payment and acceptance of part before the day, in satisfaction of the whole, will be a good satisfaction, in respect of the circumstance of time, for perhaps a part before the day may be more beneficial than the whole at the day, and the value of the satisfaction is not material. So if I am bound in 20*l.* to pay you 10*l.* at *Westminster*, and you request me at the day to pay 5*l.* at *York*, and are willing to receive it in full satisfaction, it is a good satisfaction for the whole, for the expence of paying at *York* is sufficient. But the plaintiff had judgment, because the defendant did not plead that he had paid in satisfaction, but only that the plaintiff had received in satisfaction; and the payment is always to be directed by him who makes it, and not by him who accepts it.

(c) Manifesti juris est, tam alio pro debitore solventi, quam rebus pro numerata pecunia consentiente creditore datis, tolli obligationem.

(d) Tutor decedens aliis heredibus scriptis, pupillo suo, cujus tutelam gessit, tertiam partem bonorum dari voluit, si heredibus suis tutelae causa controversiam non fecerit, sed eo nomine omnes liberaverit: pupillus legatum praetulit & postea nihilominus petit quicquid ex distinctione aliave causa ad tutorem suum ex tutela pervenerit. Quæro an verbis testamenti ab his exactionibus excludatur? Respondit, si, priusquam conditioni pareret, fidei commissum percipisset, & pergeret petere id in quo contra conditionem faceret, doli mali exceptionem obtinens; nisi paratus esset, quod ex causa fideicommissi percipisset, reddere; quod ei ætatis beneficio indulgendum est.

ment entered into with the creditor. *L. 57. (a) L. 96. (b) § 2. ff. de Solut.*

By the *Roman* law, this power ceased, when upon the demand of the creditor there intervened a *litis contestis*, *d. l. 57*. This I think should not be followed in our laws.

[497] These agreements for paying any thing else in lieu of what is due, are always presumed to be made in favour of the debtor; therefore, the debtor has always a right to pay the thing which is actually due, and the creditor cannot demand any thing else.

Therefore, if by a contract of marriage a husband receives a certain portion, for security of which he obliges particular lands, and it is said that, after the dissolution of the marriage, the wife shall receive them in discharge of her portion, this agreement does not prevent the husband or his heirs retaining the lands, upon offering the amount of the portion. *L. 45. (c) ff. de Solut.*

For the same reason, if I have let a vineyard for the yearly sum of 500*l.* payable in the wines of the vintage, the liberty of paying in wines is deemed to be allowed in favour of the tenant; and I could not oblige him to give me wines, if he offers to pay me his rent in money.

But if a different thing had been paid in lieu of what was due, and actually consumed, the debtor could have no right of repetition upon offering to pay the sum which was due. *L. 10. (d) L. 24. (e) cod. de Solut.*

§ II. Is the Creditor bound to receive what is due in Parcels?

[498] Although a debt be divisible, if it is not actually divided, the creditor is not obliged to receive what is due to him in parts,

(a) Si quis stipulatus fuerit *decem in melle*; solvi quidem mel potest, antequam ex stipulatu agatur: sed si mel actum sit, et petita decem fuerint, amplius mel solvi non potest.

(b) Soror cui legatum ab herede fratre debebatur, post motam legati questionem transiit, ut nomine debitoris contenta legatum non peteret; placuit, quamvis nulla delegatio facta, neque liberatio secuta esset, tamen nominis periculum ad eam pertinere. Itaque si legatum contra placitum peteret, exceptionem pacti non inutiliter opponi.

(c) Callippo respondit. Quamvis stipulanti uxori vir sponderit, *dirupto matrimonio prædia, quæ doti erant obligata, in solidum dare*; tamen satis esse, offerri dotis quantitatem.

(d) Successores ejus, qui major vigintiquinque annis in solutum pro debito jure mancipia dedit, hæc revocare non posse, constat.

(e) Cum pro pecunia quam [mutuo] acceperas, secundum placitum Evandro te fundum dedisse profiteris: ejus industriam, vel eventum meliorem tibi non ipsi prodesse, contrarium non postulaturus, si minoris distraxisset, non juste petis.

It is upon this principle that *Modestinus*, in the law 41. (a) § 1. *ff. de Usur.* decides, that unless there is a clause in the contract, that the debtor may pay by parcels, a tender of a part does not prevent the course of interest even as to that part. This decision clearly supposes the principle, that a creditor is not obliged to receive what is due to him by parcels; if he were so obliged, and the consignation were valid, the interest would cease from that time; for when a debt is acquitted in part, the interest only runs upon the remainder. This is decided by the law 4. (b) *Eod. de Comp.*; and good sense alone is sufficient to establish it.

It may be said, what interest can a creditor have in refusing his debtor the convenience of discharging his debt by parcels? The answer is, that a person has an interest in receiving at once a gross sum for the purposes of his business, rather than several small sums at different times, which are imperceptibly consumed as they come in. Besides, it is inconvenient for the creditor to keep an account of these small sums, and make a calculation of them. *Dumoulin, tr. de div. & indiv. P. 2. n. 14.*

It is even not sufficient to offer the whole principal, when it carries interest, the creditor is not obliged to receive it, without having at the same time all the interest which is due upon it.

[499] When several persons have become sureties for a debtor, although they have among themselves the benefit of division (c), yet if the creditor does not proceed against them for the payment, they cannot separately oblige him to receive the payment in part.

The reason is, that the debt, to which several sureties have acceded, is not *pleno jure* divided among them, they have only an exception, by which they are entitled to a decree for the division of the debt; it is when they are proceeded against for payment, and are all solvent, that this exception may be proposed; the debt, until that time, being undivided, it follows, that the creditor cannot be obliged to receive it in part.

(a) Tutor condemnatus per appellationem traxerat executionem sententiæ: Herennius Modestinus respondit, eum qui de appellatione cognovit, potuisse, si frustratoriam morandi causa appellationem interpositam animadverteret, etiam de usuris medii temporis eum condemnare. Lucius Titius, cum centum, & usuras aliquanti temporis deberet, minorem pecuniam, quam debebat, obligavit. Quæro, an Titius pecuniæ, quam obligavit, usuras præstare non debeat? Modestinus respondit, si non hac lege mutua pecunia data est, *ut acceret & particulatim [quod acceptum est] exsolvere*; non retardari totius debiti usurarum præstationem, si cum creditor paratus esset totum suscipere, debitor, qui in exsolutione totius cessabat, solam partem deposuit.

(b) Si constet pecuniam invicem deberi: ipso jure pro soluto compensationem haberi oportet ex eo tempore, ex quo ab utraque parte debetur, utique quoad concurrentes quantitates, ejusque solius, quod amplius apud alterum est, usuræ debentur, si modo petitæ earum subsistit.

(d) Vide supra, n. 415.

A judicial demand for the creditor to receive his part, by a surety against whom no process has been instituted, or to discharge him from the obligation, cannot be supported, however long a time may have elapsed since entering into his obligation; for the surety is only entitled to the *actio mandati*, to be discharged from his undertaking, and this against the principal debtor, for whom he has engaged, and not against the creditor.

Such a demand cannot be sustained, even if the surety should allege that the principal debtor and the co-sureties, although yet solvent, began to be in precarious circumstances, and that he ought not to suffer from the creditor's neglecting to proceed against them; the only recourse which the surety has is to pay the whole debt, and to procure subrogation of the rights and actions of the creditor. *Dumoulin, tr. d. div. & indiv. P. 2. n. 54, 55, 56.*

Dumoulin, n. 57. goes further: "Although the obligation of the sureties should be *pleno jure* divided amongst them, as, if three persons became sureties for a debtor, each for a third part, he thinks that even in this case, the surety who is not proceeded against for payment, cannot oblige the creditor to receive the payment of his third part, because, says he, the obligation of sureties ought not indirectly to impair the principal obligation, and render it payable in parcels before it is actually divided."

I think *Dumoulin* goes too far; for as this surety is only obliged for a third part, he ought to have the power of liberating himself, by paying that third part, which is all that he owes, it being permitted to every debtor to liberate himself, upon offering every thing that he owes. I even think that the principal debtor, who cannot in his own name pay in parcels, may pay for one of the sureties the third which that surety owes. The debtor having an interest in paying for this surety, to discharge himself from the indemnity which he is bound to give, the creditor cannot refuse such payment. *Dumoulin, ibid. n. 50*, agrees that this is the general opinion of the doctors, though he is of a different one himself.

[500] The rule that a creditor cannot be obliged to receive his debt by parcels, provided the debt is yet undivided, is subject to exceptions; first, when there is a clause in the contract, that the debt shall be divided into a certain number of payments; as, into two, or three payments, or when, in consideration of the poverty of the debtor, the judge directs it by a sentence of condemnation; the creditor is in all these cases bound to conform to what is prescribed by the agreement, or by the sentence.

When it is not expressed what shall be the amount of each payment, it should be understood that all the payments should be equal. For instance, if I am bound to pay a thousand pounds in four payments,

payments, each payment must be a fourth of that sum, neither more nor less; except that I may make several payments at once, by paying the half or three-fourths of the sum.

When the agreement imports, that the payment shall be made in two different places conjunctly, as at my house at *Orleans*, AND my banker's at *Paris*, this clause means that a moiety shall be paid in each place; if the particle is disjunctive, as at *Paris* OR *Orleans*, the creditor is only bound to receive the money in one payment, at which of the places the debtor thinks proper.

[501] Our rule is subject to a second exception, when there is a dispute concerning the quantity that is due; as, if I state an account by which I make myself debtor of a certain sum, and the creditor insists that the balance amounts to a greater sum, the law 31. (4) *ff. de Reb. Cred.* directs that in this case the creditor shall be obliged to receive the admitted balance without prejudice to the remainder, which shall be subject to the decision of the contest. This decision being very equitable, it is in the discretion of the judge to admit such provisional payment, when the debtor requires it.

[502] The rule is subject to a third exception, in the case of compensation, (set off,) for a creditor is obliged to admit a compensation, of what is due from him to his debtor as far as it goes, although it be less than what is due to himself.

[503] A person who is creditor of another for different debts, is obliged to receive a payment offered by the debtor of any one, although he does not offer the payment of the others at the same time (b).

For the same reason, a debtor of several years rent may oblige the creditor to receive the payment for one year, although he does not offer him the payment of the others at the same time; for all the arrears are so many different debts; the creditor, however cannot be obliged to receive the last year's payment before the first, *ne rationes ejus conturbentur*. *Dumoulin, ibid. n. 44.*

According to this principle, *Dumoulin, ibid.* decides, that the holder of an estate, who is subject to lose his right in it, by non-payment of a rent charge for three years, may avoid such penalty,

(a) Cum fundus vel homo per conditionem petitus esset, puto, hoc nos jure uti, ut post judicium acceptum causa omnia restituenda sit: id est; omne, quod habiturus esset actor, sitis contestandæ tempore solutus fuisset.

(b) I conceive that this point would, according to the law of *England*, admit of distinctions; where goods had been purchased at several times, the consolidated amount would constitute an entire debt; but if a tenant rendered his rent, or a debtor the money due on the condition of a bond, the tender could not be refused, and a distress made for the rent, or an action sustained on the bond on account of any unconnected debt, not being included in the tender.

on offering the payment of one year, before the expiration of the third.

§ III. *In what manner may the Thing, which is due, be paid?*

[504] The payment of a thing can only be made by transferring to the creditor the irrevocable property of it, *non videntur data quæ eo tempore quo dantur, accipientis non sunt. L. 167. ff. de Reg. Jur.*

Hence it follows, as has already been observed in Art. I. that the payment of a thing is not valid, when it does not belong to the person who gives it in payment, without the consent of the real proprietor.

Nevertheless, such payment may afterwards become valid, if the creditor who receives it becomes proprietor, by enjoying the thing so as to acquire a prescriptive title, or when he can no longer apprehend an eviction; as where the person giving it has become sole heir of the proprietor, or where the thing is no longer in existence, or has been *bonâ fide*, consumed by the creditor who received it. *L. 60. (a) L. 78. (b) L. 94. (c) § 2. ff. de Solut.*

The reason is, that in these cases, the subsequent occurrences supply what was originally wanting to complete the payment, as the creditor thereby acquires either the property of the thing which he has received in payment, or something equivalent to it.

[505] But where the creditor receives his own property by mistake, the payment made to him is so null, that it can never become valid; for he can never be supposed to have acquired either really, or by way of equivalent, what already belonged to him; *quod meum est, amplius meum esse non potest.*

[506] When the payment is made to a third person, by the order of the creditor, it is likewise necessary that the property which is paid, should be transferred either to the creditor, when such third person receives it in his name, and for the purpose of acquiring it for him; or to the third person himself, if such was the intention of the creditor.

Hence it follows, that if I have given an order to a person who has sold me an estate, to deliver it to my wife, to whom I intended to give it; as the payment or delivery of it to my wife, is not

(a) Is, qui alienum hominem in solutum dedit, uscapto homine liberator.

(b) Si alieni nummi inscio vel invito domino soluti sunt, manent ejus, cujus fuerunt, & mixti essent, ita ut discerni non possent: ejus fieri, qui accepit, in libris Gaii scriptum est: ita ut actio domino cum eo, qui dedisset, furti competeret.

(c) Sed et si fidejussor alienos nummos in causam fidejussionis dedit; consumptis his, mandati agere potest: et ideo si tam pecuniam solvat, quam subripuerat, mandati ager, postquam furti, vel ex causa conditionis præstiterit.

sufficient to transfer the property to her, (as donations between husband and wife are forbidden by law,) nor to myself, (as my wife did not receive it for me;) and as my debtor consequently remains the proprietor of the estate, such payment, considering only the subtilty of law, is not valid, and does not liberate my debtor; but if he is not in this case liberated *ipso jure*, and according to the subtilty of law, he is liberated *per exceptionem doli*, as good faith does not permit that I should demand from him an estate, which by my act he is rendered incapable of delivering to me, having delivered it by my order to my wife; therefore he is only bound to cede to me his right of revindication to be exercised at my risk. This results from *L. 26. (a) ff. de Donat. inter vir. & uxor.* and law *38. (b) § 1. ff. de Solut.*

According to our usages, it is not even necessary that my debtor should subrogate me to his right of revindication; the law subrogates me *pleno jure*.

[507] It is not sufficient to constitute a valid payment, that the property be transferred to the creditor; it is requisite, as we have already said, that it be done irrevocably, for it is not really transferring it, if it is transferred in such a manner that he cannot always retain it; according to the rule of law, *quod evincitur, in bonis non est. L. 190. ff. de R. J.*

For instance, if the thing given in payment were subject to hypothecations, whether it were the very thing which is due, or whether it were given in payment of a sum of money, the debtor would not by such payment be acquitted of his debt, unless he discharged the hypothecations, *L. 20. (c) L. 69. (d) L. 98. (e) ff. de Solut.*
for

(a) Si cum, qui mihi vendiderit, jusserim *eam rem uxori meae donationis causa dare*, et is possessionem jussu meo tradiderit, liberatus erit: quia licet illa jure civili possidere non intelligatur, certetamen venditor nihil habet quod tradet.

(b) Si debitorem meum jusserim *Titio solvere*, deinde Titium vetuerim accipere, et debitor ignorans solverit: ita cum liberari existimavit, si non ea mente Titius nummos accepit, ut eos lucretur: alioquin, quoniam furtum eorum sit facturus, mansuros eos debitoris: et ideo liberationem quidem ipso jure non posse contingere debitori: exceptione tamen ei succuri æquum esse, si paratus sit conditionem furtivam, quam adversus Titium habet mihi præstare; sicuti servatur, cum maritus uxori donaturus, debitorem suum jubeat solvere: nam ibi quoque, quia nummi mulieris non sunt, debitorem non liberari: sed exceptione eum adversus maritum tuendum esse, si conditionem, quam adversus mulierem habet, præstet: furti tamen actionem in proposito mihi post divortium competituram quando non interfit interceptos nummos non esse.

(c) Si rem meam, quæ pignoris nomine alii esset obligata, debitam tibi solvero, non liberabor: quia advocari tibi res possit ab eo, qui pignori accepisset.

(d) Si hominem, in quo usufructus alienus est, vel qui erat pignori Titio obligatus, noxæ dedisti: poterit is, cui condemnatus es, tecum agere judicati: nec expectabimus, ut creditor evineat, sed si usufructus interierit, vel dissoluta fuerit pignoris obligatio: existimo processuram liberationem.

(e) Qui res suas obligavit, postea aliquam possessionem ex his pro filia sua dotem præmittendo

for such a payment not having transferred to the creditor, to whom it was made, a property of the thing, which he can always retain, is not a valid payment, and consequently does not extinguish the debt.

If by a clause of the contract, the debtor, who is obliged to give a certain thing, had charged the creditor with the risks of such thing, or if the thing was declared by the contract to be subject to a particular kind of eviction; his being subject to such eviction, provided he has no ground to apprehend any others, will not prevent the payment from being valid.

§ IV. *In what State ought a Thing to be given in Payment?*

[508] When a debt is of a certain and determinate thing, that thing may be effectually given in payment, in whatever state it may happen to be, provided the deteriorations subsequent to the contract have not arisen from the fault of the debtor, or of persons for whom he is responsible, such as his workmen, or servants (a).

If the deterioration arises by accident, or by the act of a stranger, the debtor may make a valid payment of it, according to the state in which it is; he is no further obliged than to cede to the creditor, the actions which he might institute against the person who caused the damage; and if he does not cede them, the judge would subrogate the creditor, who is the person that has really sustained the damage.

[509] It is otherwise, when the debt is of an indeterminate thing; as if a horse-dealer has promised, by a contract

mittendo obligavit, et solvit: si ea res a creditore evicta est, dicendum est maritum ex dotis promissione agere posse, ac si statu liberum, remve sub conditione legatam, dotis nomine pro filia pater solvisset, harum enim rerum solutio non potest nisi ex eventu liberari; scilicet, quo casu certum erit remanere eas.

(a) *Fitzherbert v. Shaw*, 1 H. B. 258. The landlord of an estate having brought an action of ejectment against the tenant, the parties entered into an agreement, that judgment should be signed for the plaintiff, with a stay of execution until, &c. and that the defendant should continue in possession until that time. In the mean time the defendant removed a stable fixed on blocks or rollers. The Court held it unnecessary to go into the general question of the right of the tenant to remove a building of that description, since the fair interpretation of the agreement was, that as the defendant was to remain in possession for a certain time after that agreement was entered into, he should do no act in the mean time to alter the premises, but should deliver them up in the same situation as they were in when the agreement was made.

I cannot but think that the Court here ascribed an intention to the parties different from that which most probably existed in point of fact, and that the only thing in contemplation of the parties was, that they should at a certain time be placed in the same situation, as if the cause had gone on to trial, without any design on the part of the tenant to abandon any right which he in that case could have enjoyed.

of marriage, to give his son-in-law a horse, as part of his daughter's portion, without specifying what horse; if one of his horses becomes lame, or broken-winded, he could not give this horse in discharge of his debt; he ought to give one which had no material defect. *L. 33. (a) in fin. ff. de Solut.* Whereas if he obliged himself to give to his son-in-law such a horse determinately, he would be discharged from his obligation in giving him that horse, in whatever state it might happen to be.

A R T I C L E IV.

When ought the Payment to be made ?

[510] It is evident that a payment cannot be made of any thing before it is an actual debt, for where there is no debt there can be no payment. Hence it follows, that if a debt is suspended by the condition under which it was contracted, and which is not yet accomplished, no payment can be made of it.

Not only is the debtor exempt from any obligation of paying, or the creditor of receiving, before the condition is accomplished; but if the debtor, being ignorant of the condition, pays by mistake, he has a right of repetition *per conditionem indebiti*; for in this case he would pay what he did not yet owe. But this payment which was not valid at first, is confirmed and becomes valid by the accomplishment of the condition: for such accomplishment has a retrospective effect to the time of the contract; and the debt is considered as due from the time of the contract being made, (*supra*, n. 220,) and by a necessary consequence, the payment made before the accomplishment of the condition is considered as valid. *L. 16. ff. de Cond. (b) Indeb.*

[511] A term of payment differs from a condition, as such term has not the effect of suspending the debt, but merely of postponing the right of demanding it, (*supra*, n. 230.) A payment before the term is valid. *L. 1. (c) § 1. ff. de Cond. & Demost.*

This rule however is subject to some exceptions: for instance, if a testator having bequeathed a sum of money to a minor, to prevent its being consumed by the tutor, had ordered that it should

(a) *Qui hominem dari promissit, et vulneratum a se offert, non liberatur. Judicio quoque accepto, si hominem is cum quo agetur, vulneratum a se offert, condemnari debebit. Sed et ab alio vulneratum si det, condemnandus erit, cum possit alium dare.*

(b) *Sub conditione debitum, per errorem solutum, pendente quidem conditione repetitur; conditione autem existente repeti non potest.*

(c) *Cum dies certus adscriptus est, quamvis dies nondum venerit, solui tamen possunt: quia certum est ea debita iri.*

be paid at the majority of the legatee, the heir who should pay the legacy before, would not be liberated in case of the insolvency of the tutor. *V. L. 15. (a) ff. de Ann. Leg.*

See as to the term of payment. Part II. Chap. 3. Art. III.

A R T I C L E V.

Where and at whose Expence ought the Payment to be made?

§ I. *Where ought the Payment to be made?*

[512] When there is a place appointed by the agreement for the payment, it ought to be made there. If no place is appointed, and the debt is of a specific thing, the payment should be made where the thing is. For instance, if I have sold the wine of my vineyard to a merchant, the delivery ought to be made in my repository where the wine is: he should send there for it, and load it at his own expence; my obligation is to deliver it to him where it is, and I am not obliged to take it up, but merely to give him the key, and permit him so to do. This is conformable to the law 47. § 1. *ff. de Leg. 1. Si quidem certum corpus legatum est, ibi præstabitur ubi relictum est.*

If the debtor, after the sale, has transferred the thing from the place where it was, to another place, from which the carriage would be more expensive to the creditor, he may demand by way of damages, what the carriage cost, more than it would have cost if it had remained in the place where it was before the sale; as the debtor ought not by his act to prejudice the creditor.

[513] If the debt is not of a specific thing, but of any thing indeterminate, as a pair of gloves, a sum of money, a certain quantity of corn, wine, &c. the payment in this case cannot be where the thing is, because the generality of the engagement prevents there being any such place; where must it be then? The law above cited decides, that in this case payment should be made at the place where it is demanded, *ubi petitur*; that is to say, at the domicile of the debtor. *Dumoulin, Tr. de Usur. q. q.*

The reason is, that as agreements ought in respect of the things, which are not expressed by the parties, to be interpreted rather in favour of the debtor than of the creditor, *in cujus potestate fuit legem*

(a) [Javolenus] Eum, qui rogatus post decem annos restituere pecuniam, ante diem restituerat, respondit: si propter capientis personam, quod rem familiarem tueri non posset, in diem fideicommissum relictum probetur, et perdituro ei id heres ante diem restituisset, nullo modo liberatum esse: quod si tempus heredis causa prorogatum esset, ut commodum medii temporis ipse sentiret, liberatum eum intelligi: nam et plus eum præstitisse, quam debuisset.

apertius dicere, (supra, n. 97.) from these principles it follows, that when they have not assigned a place for payment, the agreement ought to be interpreted in a manner the least burthensome and expensive to the debtor.

Our principle, that such things are payable at the domicile of the debtor, when no other place has been appointed for payment by the agreement, is subject to an exception when two things concur; when the debtor and creditor reside near each other; as if they live in the same town, and the thing due consists in a sum of money, or any thing else that may be carried, or sent to the creditor's without expence; where these two things concur, payment should be made at the house of the creditor. *Dumoulin, ibid.* In this case, the debtor owes his creditor this compliment which costs him nothing; in default of paying at the house of the creditor, the creditor may send a process of commandment to the house of the debtor, who will be liable for the expences of it, and the debtor may pay the officer who serves the process.

Although it is said expressly by the act, that the payment shall be at the house of the creditor, who at the time of the act resided in the same town with the debtor, and *a fortiori* if no place has been appointed for payment; if the creditor, subsequent to the contract, has changed his domicile to a town, at a distance from that of the debtor, the debtor may demand that the creditor should choose a domicile in the place where he resided, when the contract was made; as this transfer of domicile to a place where the debtor did not reside ought not to be burthensome to the debtor, and alter his condition to his detriment, according to the rule, that *nemo alterius facto pregravari debet*.

See Part II. Ch. 3. Art. IV.

§ II. *At whose Expence is the Payment to be made?*

[514] Payment is made at the expence of the debtor; therefore, if he desires an acquittance before a notary, the acquittance should be passed at his expence.

Therefore a person who sells wine, ought to pay the expence of a permit, for the delivery of it.

ARTICLE VI.

Of the Effect of Payments.

[515] The effect of a payment is to extinguish the obligation and every thing accessory to it, and to liberate all the debtors of it. *L. 43. (a) ff. de Solut.*

§ 1. *Whether a single Payment may extinguish several Obligations?*

[516] Sometimes a single payment may extinguish several obligations: this happens when the thing given in discharge of an obligation is the very thing which is the object of another obligation.

For instance, if I have agreed to sell you the thing which I have given you in pledge, in payment of a sum which you have lent me, my payment of this thing extinguishes at once the obligation resulting from your loan to me, and from my sale to you, *L. 44. (b) ff. de Solut.* for the thing which I have paid you, in discharge of the obligation resulting from the loan, is the same thing which constitutes the object of my obligation resulting from the sale.

[517] This rule holds good even with regard to different creditors: for instance, if I have by your order paid ten thousand livres, which I owe you, to your creditor to whom you owe the same sum, this payment extinguishes at once both my obligation and yours, *L. 64. (c) ff. d. t.* it amounts to two payments, *juris effectus*; for it is as if I had paid you the money, and you had paid it afterwards to your creditor, *celeritate conjungendarum inter se actionum, unam actionem occultari*, *L. 3. § 12. ff. de Don. int. Vir. & Uxor.*

(a) In omnibus speciebus liberationum etiam accessiones liberantur, puta adpromissores, hypothecæ, pignora; præterquam quod inter creditorem et adpromissores confusione facta reus non liberatur.

(b) In numerationibus aliquando evenit, ut una numeratione duæ obligationes tollantur uno momento; veluti si quis pignus pro debito vendiderit creditori, evenit enim, ut [&] ex vendito tollatur obligatio, et debiti. Item si pupillo, qui sine tutoris auctoritate mutuum pecuniam accepit, de atum a creditore fuerit sub ea conditione, si eum pecuniam numeraverit, in duas causas videri eum numerasse; et in debitum suum, ut in Falcidiam heredi imputetur; et in conditionis gratia, ut legatum consequatur. Item si usufructus pecuniæ numeratæ legatus fuerit; evenit, ut una numeratione [&] liberetur heres ex testamento, et obliget sibi legatarium.

Tantundem est, et si damnatus fuerit alicui vendere vel locare; nam vendendo, vel locando, et liberatur ex testamento heres, et obligat sibi legatarium.

(c) Cum jussu meo id, quod mihi debes, solvis creditori meo; et tu a me, et ego a creditore meo liberor.

[518] This rule, that a payment made in discharge of one obligation, extinguishes others which have the same object, applies likewise with respect to several debtors.

For instance, if by your orders I have lent a sum of money to *Peter*, the payment by *Peter* extinguishes at once both your obligation and his own.

This observation, that when there are obligations, which, although proceeding from different causes have nevertheless one and the same object, the payment of one extinguishes both, only holds good where the debtor who has paid, has not a right of requiring a cession of the actions of the creditor, against the debtor of the other obligation; but in the opposite case, where the debtor who has paid has a right to require such cession of the other obligation, subsists, not indeed so that the creditor can be paid a second time, but so that he may cede his action to the person entitled.

For instance, retaining the same example, if by your direction I have lent a sum of money to *Peter*, we have seen that a payment by *Peter*, extinguishes both his obligation and yours; but if before *Peter* pays me, you pay me to liberate yourself, this payment only extinguishes your obligation, and not that of *Peter*; because upon paying me you have a right to require the cession of my action against *Peter*, who remains obliged not to me, who cannot demand the same thing twice over, but to you, in consequence of the cession of my actions, which I ought to make. *L. 95. (a) § 10. ff. de Solut. L. 28. (b) ff. Mand.*

Such cession of actions against the debtor of a different obligation, may be made even *ex intervallo* after the payment, in which respect it differs from that against the co-debtors of the same obligation, of which we shall speak in the following paragraph.

(a) Si mandatu meo Titio pecuniam credidisses, ejusmodi contractus similis est tutori et debitori pupilli; et ideo mandatore convento et damnato, quinquam pecunia soluta sit, non liberari debitorem ratio suadet; sed et præstare debet creditor actiones mandatori adversus debitorem, ut ei satisfiat. Et huc pertinet tutoris et pupilli debitoris nos fecisse comparisonem; nam cum tutor pupillo tenetur ob id quod debitorem ejus non convenit, neque judicio cum altero accepto, liberatur alter: nec si damnatus tutor solverit, ea res proderit debitori: quin etiam dici solet tutelæ contraria actione agendum, ut ei pupillus adversus debitores actionibus cedat.

(b) Iapinianus, lib. 3. Questionum, ait, mandatorem debitoris solventem, ipso jure eum non liberare; propter mandatum enim suum solvit et suo nomine, ideoque mandatori actiones potest adversus eum cedi debere.

§ II. *Whether Payment by one of the Debtors, extinguishes the Obligations of all the other Debtors of the same Obligation; and of the Cession of Actions.*

[519] If the payment of one obligation may liberate the debtors of a different obligation, having the same object, as we have seen in the preceding paragraph; *a fortiori*, the payment by one of the debtors of the same obligation ought to liberate all the others, whether they be principals or accessaries, such as sureties.

[520] This rule is subject to a limitation, in the case of the cession of actions: for, if one of the co-debtors or sureties, upon paying the debt, procures a cession of the rights and actions of the creditor, the debt is not considered as extinguished in respect to those against whom the actions have been ceded.

Many questions may be proposed concerning this cession of actions: 1st, What persons upon payment of a debt, have a right to demand a cession of the actions of the creditor, against the other debtors who are liable to it? 2d, Is the creditor so far obliged to make this cession, that he cannot demand his debt wholly, or in part, from those to whom he was obliged to cede them, when he has by his own act disabled himself from such cession? 3d, Does the cession take place *pleno jure*? or, must it be demanded, and when? 4th, What is the effect of it?

Upon the first question it must be admitted as a principle, that all those who are bound for a debt for others, or with others, by whom they ought to be discharged either wholly or in part, have a right, upon paying, to demand a cession of the actions of the creditor against the other debtors.

It is upon this principle that *Julian* decides, that a surety is entitled, upon payment, to have a cession of the actions of the creditor, as well against the principal debtor, as against all other persons who are liable; *fidejussoribus succurri solet, ut stipulator compellatur ei, qui solidum solvere paratus est, vendere ceterorum nomina. L. 17. ff. de Fid.*

For the same reason, the creditor cannot refuse a debtor in solido, from whom he demands the whole debt, a cession of his actions against the other debtors. *L. 47. (a) ff. Locat.*

This obligation of the creditor to cede his actions is founded upon the rule of equity, that as we are obliged to love all mankind,

(a) Cum apparebit emptorem conductoremve pluribus vendentem vel locantem, singulorum in solidum intuitum personam; ita demum ad præstationem partis singuli sunt compellendi, si constabit esse omnes solvendo, quanquam fortasse justius sit, etiamsi solvendo omnes erunt, electionem conveniendi quem velis, non auferendam actori, si actiones suas adversus ceteros præstare non recuset.

we are obliged to give them every thing which they have an interest in having, when we can do so, without detriment to ourselves.

A debtor in solido having then a just interest to have a cession of the actions of the creditor against his co-debtors, in order to compel them to bear a part of a debt for which they are equally liable with him, the creditor cannot refuse it to him. For the same reason he cannot refuse it to a surety, or generally to any others, who, being liable to the debt, have an interest to be discharged from it wholly or in part, by those for whom, or with whom they are debtors.

But if a stranger pays a debt to which he was not liable, and without having any interest to discharge it, the creditor is not obliged, if he does not think proper, to cede him his actions. L. 5. (a) *Col de Solut.*

This is subject to an exception with respect to bills of exchange: if a stranger, for the sake either of the drawer or some one of the indorsers, or the acceptor, acquits a bill of exchange of which he was not debtor, the cession of the actions of the creditor cannot be refused to him, he is even subrogated to it *pleno jure*, by the ordonnance of 1673, as we have seen in our treatise upon bills of exchange.

[521] Upon the second question, whether the creditor ought to be excluded from his demand, against one of the debtors, *per exceptionem cedendarum actionum*, when by his own act he has deprived himself of the power of ceding his actions against the others, there is no difficulty with regard to *mandatorum pecunie credenda*. *Papinian* decides it in formal terms, in the law 95. § 11. *ff. de Solut.* “*Si creditor a debitore culpa sua causa ceciderit, prope est ut actione mandati nihil a mandatore consequi debeat; cum ipsius vitio acciderit, ne mandatori posset actionibus cedere.*”

The reason is evident: it is a principle common to all reciprocal contracts, that where we have contracted mutual obligations, I am not admissible to demand the performance of yours, when by my own fault I fail in the performance of mine. According to this principle, if you have lent a certain sum to *Peter* by my order, and by your own fault have lost the action, which you had acquired by the loan, and consequently cannot cede it to me, you ought not to be allowed to demand from me the money, which I have obliged myself by the contract of mandate to reimburse you; since you have by your own fault rendered yourself incapable of fulfill-

(a) Nulla tibi adversus creditorem alienum actio superest, eo quod ei debitam quantitatem offerens, jus obligationis in te transferri desideras, cum ab eo te nomen comparasse non suggeras; licet, solutione ab alio facta nomine debitoris, transire solcat obligatio.

ing your obligation, to cede to me your action against *Peter* upon the loan. *V. supra. n. 445.*

Ought the same decision to be followed with regard to sureties? May a surety, from whom the creditor demands the payment of a debt, be discharged from the demand, so far as he might have obtained a repetition by a cession of the actions of the creditor, when such creditor has by his own act rendered himself incapable of ceding them to him? The reason for doubting is, that I see no text of the laws which expressly contains such decision, with regard to sureties. The law 95. § 11. above cited, which gives this *fin de non recevoir* to *mandatores pecunie credenda*, does not appear to me decisive as to sureties; for there is not the same reason for it: a person who lends a sum of money to *Peter*, by the order of another, has, by the contract of mandate included in the order which he has executed, contracted a formal obligation towards the *mandator pecunie credenda*, to cede and preserve the action which he would acquire by the loan made to *Peter*, in performance of the mandate. It cannot be said in the same manner with respect to a surety, that the creditor has contracted a similar obligation in his favour; the engagement of a surety is an unilateral contract, by which he alone is obliged. If the creditor is obliged to cede his actions to the surety, at the time of payment, it is the principle of equity alone which obliges him to do so, for he has no interest to refuse it; but he ought only to be obliged to cede them such as they are; and is not subject to any imputation for not having retained them, and for having disabled himself from ceding them. There is another difference which *Cujas* observes, *ad. L. 21. ff. de Pact.* A person by whose order I have lent a sum of money to *Peter*, not having any action against *Peter*, has an absolute occasion for my ceding to him my actions against *Peter*; but a surety, having of his own right an action against his principal, has no absolute occasion for the cession of the action of the creditor against the principal debtor, although the cession of hypothecations may be useful to him; *nec usquam legitur*, says *Cujas*, *cogi creditorem fidejussori cedere actionibus fortis.*

Not only is there no text of law, which decides that the surety can exclude the creditor from the whole or part of his demand, on account of his having rendered himself incapable of ceding his actions either against the principal debtor, or against any of the other sureties; there are even passages which seem to imply the contrary: such is the law 22. ff. (a) *de Pact.* where it is said, that a creditor may make an agreement with the principal debtor, not to demand the payment of the debt from him, and may nevertheless

(a) Nisi hoc actum est, ut daretur a reo non petatur, [à fidejussore petatur]: tunc enim fidejussor exceptione non utetur.

reserve the power of demanding it from the surety. In this case, the creditor may demand the payment from the surety, although he has, by the agreement with the debtor, incapacitated himself from ceding his action against him. The law 15. § 1. *ff. de Fid.* appears likewise to decide, that the creditor, who by his own act has rendered himself incapable of ceding his actions to one surety against the other, is not on that account in any wise excluded from his demand; *si ex duobus qui apud te fidejusserant in viginti, alter, ne ab eo peteres, quinque tibi dederit vel promiserit; nec alter liberabitur, et si ab altero quindecim, petere institueris, nulla exceptione summo-veris; ne-* vertheless, the creditor has disabled himself from ceding his actions to the one from whom he demands the fifteen, so as to enable him to recover five from the other. Notwithstanding these reasons, it must be decided, that when the creditor has by his own act incapacitated himself from ceding to the surety his actions, either against the principal debtor, or against the other sureties, whether because he has discharged them, or because he has by his neglect allowed his demand against them to be dismissed, the surety, may, *per exceptionem cedendarum actionum*, obtain a declaration, that the demand of the creditor is inadmissible, for so much as the surety might have procured by the cession of actions, which the creditor has disabled himself from making.

This is not subject to any difficulty with regard to the action against the principal debtor: for, as we have observed *supra*, n. 370, it being of the essence of the engagement of a surety not to be obliged to more than the principal debtor, the discharge of the debtor by the creditor discharges the surety likewise, and all the exceptions *in rem*, and prescriptions, which the principal debtor acquires, are also acquired to the surety. We have answered *supra*, n. 380, to the argument founded upon the law 22. *de Pactis*.

When the creditor has rendered himself incapable of ceding his actions against one of the sureties to the others, by discharging him, or by suffering the demand against him to be dismissed, it ought in like manner to be decided, that he should be excluded *per exceptionem cedendarum actionum*, from his demand against them, not for the whole, but for that part for which they would have had recourse, if the creditor had not rendered himself incapable of ceding his action. For instance, if there were four sureties, all solvent, the creditor can only demand his debt from the three others, with the deduction of the fourth, for which they would have had recourse against the one who has been discharged; and if, amongst the other three, there happened to be one insolvent, the creditor should make a deduction from the demand against the two that are solvent, not only for the fourth, for which he who was discharged was

was liable on his own account, but also for his third of the portion of the insolvent.

The reason of this decision is, that when several persons become sureties together for one principal debtor, they rely upon the recourse which they will have against each other; and it is only in this confidence that they contract the engagement, which otherwise they would not have done; it is not just, therefore, that the creditor should by any act of his deprive them of it.

Observe, that if the surety whom the creditor has discharged, only became such after the engagements of the others, the latter would not have the exception *cedendarum actionum* against the creditor; for in contracting their engagement, they could not reckon upon a recourse against the one who had not then concurred in the engagement; it is to this case that the decision of the law 15. § 1, above cited, ought to be confined.

What has been already said with respect to sureties, must be applied to debtors in solido; when several persons contract an obligation in solido, they only oblige themselves each for the whole, under a confidence of the recourse which they shall have against the others, upon paying the whole: therefore, when the creditor, by his own act, deprives them of such recourse, by rendering himself incapable of ceding his actions against the one that he has discharged, he ought no longer to be admitted to claim in solido against the others, except subject to the deduction of the portion, for which they would have had recourse against the one whom he has discharged. *Vide supra, n. 275.*

When the creditor has allowed some right of hypothecation upon the goods of any one of his debtors to be lost, whether by omitting to oppose the adjudication of the property in favour of other persons, or by suffering persons purchasing, without the charge of the hypothecation, to acquire a liberation from it, by a possession of ten or twenty years, can the co-debtors in solido, and sureties, oppose the exception *cedendarum actionum*, upon the ground that he has disabled himself from ceding to them the hypothecatory action which he has suffered to be lost, and upon which they had relied for recourse, in case they should be compelled to pay the whole? I do not think that they can; the exception *cedendarum actionum*, as it appears to me, ought not to be opposed to the creditor, unless by a positive act on his part, he has rendered himself incapable of ceding his actions against one of the debtors, by discharging his person or property; or unless, by allowing a demand that he has instituted to be dismissed, he has laid himself open to a suspicion of collusion. But a mere negligence on his part, in not interrupting the possession of purchasers, or in not opposing the adjudications of other

other creditors, ought not to subject him to any imputation; 1st, because as he is only obliged to the cession of his actions by the mere principle of equity, not having contracted in this respect any precise obligation to the other debtors and sureties to preserve them, it is sufficient that he acts with good faith; that is, that he does nothing contrary to his obligation, and he ought not to be answerable in this respect for mere negligence; 2d, the other debtors and sureties might as well as the creditor have taken care of the right of hypothecation which he has lost; they might summon him to interrupt, at their risks, the possession of purchasers, or to oppose the adjudications; it is only in the case where they have put the creditor *en demeure*, that they can complain of his having lost his hypothecations; but when they have been no more vigilant than he has, they cannot charge him with a negligence which is equally imputable to themselves.

[521 B] The third question, whether the cession of the actions of the creditor is made *pleno jure*, has already been agitated, *supra*, n. 280, with regard to debtors in solido: we have there established, contrary to the opinion of *Dumoulin*, that it does not take place *pleno jure*, and that it ought to be required; but when it has been required, it is not necessary in our *French* practice to proceed against the creditor, if he refuses; and that the law supplies the refusal of the creditor, and transfers his actions to the person who had required the cession of them. What we have said with respect to debtors in solido, may likewise be applied to sureties.

The cession ought to be made or required at the very time of payment; without that, the payment having extinguished the credit and the actions of the creditor, a cession cannot afterwards be made of actions which no longer exist.

It is only *mandatores pecunie credende*, who, for a particular reason, may, *ex intervallo*, obtain a cession of the actions of the creditor. See *supra*, n. 445.

Observe, that there are certain cases in which the law transfers the rights and actions of the creditor to the person who has paid the debt, although he has not required the cession; these are, 1st, When a person, to prevent a protest, discharges a bill of exchange for the honour of any of the parties, he is subrogated *pleno jure* to all the rights and actions of the holder, as we have seen *supra*.

2d, If, during the community of goods between husband and wife, an annuity, which was only due by one of them, has been redeemed by the money of the community; the other is, as to his or her part in the community, subrogated *pleno jure* to all the actions of the creditor against the debtor.

3d, Where

3d, Where one hypothecatory creditor, to strengthen his right of hypothecation, pays to another what is due to him by the common debtor, such creditor has no need of acquiring a subrogation; he is subrogated *pleno jure* to the credit which he has discharged, and to the hypothecations and rights which depend upon it, *L. 4. (a), Cod. de his qui in prior*: it is evident, that he only paid for the sake of acquiring the subrogation.

With regard to a third person in possession of an estate, who, to avoid a process, has paid the debt for which his estate was hypothecated; if, upon paying, he fails to require a subrogation to the rights of the creditor, he will not indeed be subrogated to all the rights of the creditor; but he may at least, according to our usages, exercise them upon this estate against all the other creditors, posterior to him whom he has paid: for, in liberating the estate from the hypothecation, *meliozem fecit in eo fundo ceterorum creditorum pignoris causam*, and he may therefore *per exceptionem doli* retain against them what he has paid in discharge of the hypothecation; good faith does not allow them to profit at his expence; *dolo faciunt si velint ejus damno locupletari*: this case is similar to that in which the possessor of an estate subject to hypothecation, has laid out money in improvements.

The cession of actions, or at least the requisition of such cession, is necessary, in order to be subrogated to hypothecatory credits, except in the cases which we have mentioned: but with regard to credits, to which there is a personal privilege attached, such as funeral expences, expences of a last illness, rents of houses, and debts due to the revenue, &c. it is not necessary to require a subrogation, the privilege attached to these credits passes *pleno jure* to those who have discharged them, and they exercise it in the same manner as the privileged creditor whom they have paid might have done; *eorum ratio prior est creditorum, quorum pecunia ad creditores privilegiarios pervenit. L. 24. § 3. ff. de Reb. Auth. Jud. Pos. (b), alias L. 6. (c) § 5. ff. de Privil. Cred.*

[522] Upon the fourth question, what is the effect of the cession of actions? we must refer to *L. 36. ff. de Fid.* by which we learn, that payment by any person to a creditor, with subrogation to his rights and actions, is considered not so much a

(a) Si prior respubl. contraxit, fundusque ei est obligatus, tibi secundo creditori offerenti pecuniam, potestas est, ut succedas etiam in jus reipub.

(b) Eorum ratio prior est creditorum, quorum pecunia ad creditores privilegiarios pervenit. Pervenisse autem quemadmodum accipimus? Utrum si statim profecta est ab inferioribus ad privilegiarios? An vero & si per debitoris personam; hoc est, si ante ei numerata sit, & sic debitoris facta, creditori privilegiario numerata [est]? Quod quidem potest benigne dici, si modo non post aliquod intervallum id factum sit.

(c) Not found in the Digest.

payment as a sale, which the creditor is supposed to make of his credit, and of all the rights depending upon it, to the person from whom he receives the money; *non in solutum accepit, sed quodam modo nomen debitoris vendidit, d. L.*; therefore, the credit thus discharged, is deemed still to subsist with all the rights which depend upon it, in favour of the person who is subrogated; he may exercise them as the creditor to whom he is regarded as procurator *in rem suam* might have done.

This subrogation is only made for the whole, when the person who pays ought to have recourse for the whole against the principal debtor.

But when the person paying ought only to have recourse for part, and is debtor without recourse, and on his own account, the subrogation will only be for the portions for which he might have recourse, and the payment will be as to the portion of which he is debtor, without recourse, and on his own account, a pure and absolute payment, which will have entirely extinguished the debt for that part.

For instance, suppose, that there are four debtors in solido; if one of them who is debtor of the whole with respect to the creditor, and of a fourth with respect to his co-debtors, pays the whole debt with a subrogation, the subrogation can only affect the three-fourths, for which he ought to have recourse against his co-debtors; but as to the fourth, for which he was debtor without any right to reimbursement, the payment made by him is a pure and absolute payment, which so far extinguishes the debt to the extent of such part.

[523] It is a great question, whether this debtor may exercise in solido the actions of the creditor to which he is subrogated for the three-fourths, against each of his co-debtors; we have treated of this at length, *supra*, n. 281. The same question may be proposed with respect to a surety subrogated to the actions of the creditor against his co-sureties; and as the reason is the same, the decision should be so likewise.

It remains to observe, that it is only by a fiction of law, established in favour of the person who pays with a subrogation, that the credit is supposed to subsist: in truth, it is paid and extinguished; for the real intention of the parties was to make a payment, and not a transfer; therefore, if a person in redeeming an annuity, of which he was debtor in solido, or surety, takes a subrogation to the rights of the creditor of such annuity, he is not subject to the hypothecations which the creditors of the proprietor of the annuity had upon it, as a real assignee of the annuity would have been; the redemption, though made with a subrogation, being
8
a real

a real payment, has extinguished the annuity, and consequently, the hypothecations, which are extinguished *rei obligatae interitu*: a subrogation to the actions of the creditor being a mere fiction, established in favour of the person who paid, cannot be opposed to him, according to the maxim, *quod in favorem alicujus introductum est, non debet contra ipsum retorqueri*.

§ III. Of the Effect of partial Payments.

[524] Regularly payment of a part of what is due extinguishes the debt as to that part; therefore, if you owe me ten pounds, and pay me five, the debt is extinguished for a moiety. *L. 9. § 1. ff. de Solut.*

[525] To this rule there are three exceptions.

First, with respect to alternative obligations, which are not extinguished in any degree by a partial payment of one of the things due by way of alternative, until the residue is discharged. For instance, if a countryman promises a particular cow, or ten pounds, as a portion with his daughter, and pays his son-in-law five pounds, he does not by this payment, as long as the cow lives, extinguish any part of his obligation, until he pays the other five pounds. The payment which has been made is in a state of suspense. It is confirmed, and becomes valid by paying the other five pounds, which will wholly extinguish the debt. If he thinks proper, he may elect to give the cow, and in that case, the payment of the first five pounds will be void, and may be reclaimed, as having been unduly paid. *L. 26. (a) § 13. ff. de Cond. Ind.*

If, after paying the five pounds, the cow dies, so that it can no longer be given in discharge of the obligation, which therefore becomes a determinate obligation for the money, the partial payment becomes binding, and the obligation is to that extent extinguished (b).

(a) Si decem aut Stichum stipulatus, solvam quinque: queritur an possim condicere? Quæstio ex hoc descendit, an liberer in quinque; nam, si liberor, cessat condictio; si non liberor, erit condictio. Placuit autem (ut Celsus lib. 6, & Marcellus lib. 20, Digestorum, scripsit) non periri partem dimidiam obligationis. Idenque eum qui quinque solvit, in pendenti habendum, an liberaretur, petique ab eo posse reliqua quinque, aut Stichum; & si præstiterit residua quinque, videri eum & in priora debita solvisse; si autem Stichum præstiterit, quinque eum posse condicere, quasi indebita. Sic posterior solutio comprobabit, priora quinque utrum debita, an indebita solverentur: sed et si post soluta quinque, et Stichus solvatur, & malim ego habere quinque & Stichum reddere, an sim audiendus, querit Celsus? Et putat, natam esse quinque conditionem: quamvis utroque simul soluto, mihi retinendi, quod vellem, arbitrium daretur.

(b) In the case supposed, it might not be unreasonable to decide, that the payment and receipt of the first five pounds indicate an election to discharge the obligation by payment of the money, and render that which was before an alternative, a determinate obligation.

[526] The second exception relates to obligations of an indefinite thing of a certain kind, *obligationes generis*. The same observation must be applied to this case as to alternative obligations. Therefore, if a countryman engages to give his son-in-law a horse generally, and in discharge of the obligation gives him the share of a particular horse, which he holds in partnership with another person, this does not extinguish any part of the obligation, until he buys the other share, and gives it accordingly. Until that is done, the son-in-law may demand an entire horse, offering to abandon the share which has been given. *L. 9. (a) § 1. ff. de Solut.*

These decisions apply whether the obligation is contracted by one debtor or more, or in favour of one or more creditors. *L. 34. (b) § 1. ff. de Solut. d. L. 26. § 14. (c) ff. de Cond. Ind.*

[527] The third exception is, where the debtor has given one or more particular things by way of discharge for a sum of money which he owed. If this payment is defeated in any part, by an eviction, the obligation is not partially extinguished, and the creditor may, upon offering to restore the residue, resort to his original demand; for probably he would not have consented to such a payment, but from the expectation of retaining the whole. *L. 46. pr. & § 1. ff. de Solut.*

A R T I C L E VII.

Rules for the Application or Imputation of Payments.

First Rule.

[528] The debtor has the power of declaring on account of what debt he intends to apply the sum which he pays (d):
“quoties

(a) Qui decem debet, partem solvendo in parte obligationis liberatur, & reliqua quinque sola in obligatione remanent. Item qui Stichum debet, parte Stichi data in reliquam partem tenetur. Qui autem hominem debet, partem Stichi dando, nihilominus hominem debere non desinit; denique homo adhuc ab eo peti potest. Sed si debitor reliquam partem Stichi solverit, vel per actorem steterit quominus accipiat, liberatur.

(b) Si duo rei stipulandi hominem dari stipulati fuerint, & promissor utrique partes diversorum hominum dederit, dubium non est quin non liberatur; sed si ejusdem hominis partes utrique dederit, liberatio contingit; quia obligatio communis efficitur, ut quod datus solutum est, uni solutum esse videatur. Nam ex contrario, cum duo fidejussores hominem dari sponderint, diversorum quidem hominum partes dantes non liberantur, at si ejusdem hominis partes dederint liberantur.

(c) Idem ait & si duo heredes sint stipulatoris, non sic posse, alteri quinque soluta, alteri partem Stichi solvi. Idem & si duo sint promissoris heredes, secundum quam liberatio non contingit, nisi aut utrique quina, aut utrique partes Stichi fuerant solutae.

(d) This rule is followed in the *English* law, as is fully established by several cases, and is manifest from daily practice. *Pirvel's case*, 5 Co. 1:7, cited ante 495, n. The manner of tender and payment shall be always directed by the person who makes it, and by the person

“quoties quis debitor ex pluribus causis, unum solvit debitum, est in arbitrio solventis, dicere quod potius debitum voluerit solutum.” L. 1. ff. de Solut.

The reason which Ulpian gives is evident, *“possumus enim certam legem dicere, ei quod solvimus.”* d. L.

According to our rule, although regularly the interest should be paid before the principal, yet if the debtor of the principal and interest, upon paying a sum of money, has declared that he paid on account of the principal, the creditor who has agreed to receive it, cannot afterwards contest such application: *Respondi si qui dabat, in sortem se dare dixisset, usuris non debere proficere.* L. 102. § 1. ff. de Solut.

Second Rule.

[52D] If the debtor, at the time of paying, makes no application, the creditor, to whom money is due, for different causes, may make the application by the acquittance which he gives (a). *“Quoties non dicimus in id quod solutum fit, in arbitrio est accipientis, cui potius debito acceptum ferat.”* d. L.

It is requisite, 1st, That this application be made at the instant; *“dummodo in re presenti fiat, in re agenda, ut vel creditori liberum sit*

person who accepts it. *Cole v. Nattervill*, 2 P. Wms. 304. A bill for a specific performance alleged that the plaintiff had paid 6d. as earnest; the defendant pleaded that he did not accept it as earnest; and by the Lord Chancellor, it is not material in what manner the defendant accepted it, but how the other paid it; for, *quicquid solvitur, solvitur ad modum solventis*.—The defendant being indebted to the plaintiff upon bond, and also upon a book debt, paid the money due on the bond at the day; the plaintiff said it should be for the book debt; the defendant said he paid it upon his bond, and not otherwise. The plaintiff brought his action on the bond, and adjudged against him. *Anon. Cro. Eliz.* 68.—*Hawthorn v. Rawlings*, 1 Str. 23. seems contrary to all the other cases upon this subject; for there, one of three obligors pleaded payment by the other obligors, and acceptance in satisfaction. The plaintiff replied, that he did not receive it in satisfaction, and the replication was holden to be good. *Parker*, Ch. J. Suppose a man owes me 100l. on a bond, and 100l. on another account, and he pays me 100l. I may apply it to which I will; and though he paid it in satisfaction of the bond, yet if I did not receive it as such, it will be no discharge. *Pratt*, J. There can be no payment in satisfaction, without an acceptance in satisfaction.

(a) In *Manning v. Western*, 2 Vern. 606. it was held by Lord Cowper, C. that the rule *quicquid solvitur, solvitur ad modum solventis* is to be understood, when the person paying declares, at the time of payment on what account he pays; but if the payment is general, the appointment is in the receiver. And in *Bloss v. Cutting*, at Suffolk assizes, cited 2 Str. 1194, where the defendant owed money on two bonds, and paid money on account, but gave no direction which he would have it applied to, upon a case reserved, it was determined that the plaintiff had the election. This right of the receiver to apply the payment, which is generally adopted in practice, is more extensive than the right for the same purpose in the civil law: for that seems to be confined to an application contained in the acquittance given for the payment. Whereas, with us, the election may be made at any time afterwards. But in the subsequent notes, it will be seen that our courts have, in several cases (most of which are collected in *Viner's Abr. tit. Payment*), directed an application from the circumstances of the case, nearly correspondent with the rules in the text.

non accipere, vel debitori non dare, si alio nomine solutum quis eorum velit; postea non permittitur. L. 2. L. 3. ff. p. t.

2d, That it be equitable; “*in arbitrio est accipientis, cui potius debito acceptum ferat: dummodo* (adds the law) *in id constituat solutum, in quod ipse si deberet, esset soluturus, id est, non in id debitum quod est in controversia, aut in illud quod pro alio quis fidejusserat, aut cujus dies nondum venerat. d. L. 1. ff. de Solut.*

Bachovius ad Tr. t. 2. disp. 29. ch. 3. l. c. says, that this limitation ought to be understood in this sense, that as long as the thing is still entire, and as long as the debtor has not received from the creditor an acquittance, importing the application, he may object to the application which the creditor would make to the account of those debts which the debtor had least interest to acquit, and consequently, may demand that the creditor should either make an equitable application by his acquittance, or restore his money. But if the debtor has consented to the application, by receiving the acquittance which contains it, he cannot, according to *Bachovius*, contradict this application, notwithstanding it may be made to the debt which he had least interest in discharging; because *volenti non fit injuria*, and because otherwise the position, that when the application has not been made by the debtor, it is referred to the creditor, would not be true. For if we suppose that the creditor can only make the application to the debt, which the debtor had most interest in discharging, and consequently to the debt to which the law would apply the payment, if no application was made by the creditor, it follows, that the application which the creditor makes is useless, and that he has not the choice. This is the reasoning of *Bachovius*.

It may be answered, that it is not necessary to the truth of the rule, which refers the choice of the application to the creditor, if it is not made by the debtor, that the creditor should in all cases have this choice; it is sufficient that he may have it in certain cases; and when the different debts are such that it is of little consequence to the debtor, that one should be discharged rather than another. In this case, the creditor has the choice of application, if the debtor does not make it; and instead of the payment being applied by the law to the debt of the longest standing, or to all proportionately, if they were all of the same date, which, as we shall see, would be the case, if no application were made, the application will be referred to that to which the creditor shall choose to make it.

Suppose, for instance, that I am your creditor for 1000*l.* the price of an estate which I sold to you in 1750, by an act before notaries; and in another sum of 1000*l.* the price of another estate which I sold you by an act before notaries, in 1760; after having paid me the interest of both sums, you pay me 1000*l.* without mentioning on account of which of the two debts you

intend to pay it; it is indifferent to you to which of the two the application should be made, since both are hypothecatory, may be demanded, and carry interest; but it is of material importance to me to make the application to the debt of 1760, in order to preserve my hypothecation of 1750; for if I did not make this application, it would be the debt of 1750, which, as the most ancient, would be supposed to be paid.

The other argument opposed by *Bachovius* appears more plausible, namely, that the debtor, who by taking a receipt, which contains the application, has consented to such application, is not admissible to contradict it, whatever interest he had that it should be made on account of the other debt. However, I do not think that this ought to be decided indiscriminately: for, if the debtor is an illiterate person, the application, which has slipped into the receipt, ought not to prejudice him when the sum paid equals or exceeds the amount of the debt which the debtor had the most interest to discharge; so that the creditor could have had no reason for not making the application in which the debtor had the greater interest. For instance, suppose that a countryman owes a procureur the sum of three hundred livres, for the price of a plot of land which he has sold him, and about a year's interest; and also five or six hundred livres for fees; if the peasant pays the procureur the sum of four hundred livres, and the procureur gives him a discharge for this sum, specifying that it is on account of the fees which are due to him, it is evident that this application is a surprise upon the debtor, and that the debtor has a right to demand, that, notwithstanding what is stated in the receipt, the payment should be applied to the three hundred livres which he owed for the price of the estate, and consequently, that the interest should be declared to have ceased from the day of payment. On the contrary, if the creditor might have had a sufficient reason for not making the application to the debt, which it was of the most importance to the debtor to acquit, as, because the sum paid was less than that due on such account, and the creditor was not obliged to receive the payment of the debt in part, the application to another debt cannot be contradicted; because the creditor, who has it in his power to refuse the payment, has only accepted it upon condition of the application which he has made, and which has been agreed to by the debtor.

Observe, that when it is expressly stated in the discharge, that the sum is received on account of all the different claims of the creditor, "*ex universo credito*," this general application is only understood to comprise the debts for which the creditor has a right of

action, and not those which are purely natural. *L. 94. (a) § fin. de Solut.*

It also appears to me, that this expression should only be understood as comprising those debts of which the term of payment is expired.

Third Rule.

[530] When the application has neither been made by the debtor nor by the creditor, it ought to be made to that debt which the debtor at the time had the most interest to discharge (*b*).

Corollary I.

The application should rather be made to a debt which is not contested, than to one that is; rather to a debt which was due at the time of payment, than to one which was not. *L. 3. (c) § 1. L. 103. (d) ff. de Solut.*

Corollary II.

Among several debts which are due, the application ought rather to be made to the debt for which the debtor was liable to be imprisoned, than to debts merely civil, in respect of which process could only issue against his effects.

Corollary III.

Among civil debts the application should rather be made to those which produce interest, than to those which do not (*e*).

Corollary

(*a*) Cum Titius Gaio Seio deberet, ex causa fideicommissi certam quantitatem, & tantundem eidem ex alia causa, quam peti quidem non poterat, ex solutione autem petitionem non præstat: Titii servus actor, absente domino, solvit eam summam quæ efficeret ad quantitatem unius debiti: cautumque est ei solutum ex universo credito. Quæro id, quod solutum est, in quam causam acceptum videtur? Respondi; si quidem Titio Seius ita cavisset, ut sibi solutum ex universo credito significaret, crediti appellatio solum fideicommissam pecuniam demonstrare videretur; non eam quæ petitionem quidem non habet; solutione autem facta, repeti pecunia non potest. Cum vero servus Titii actor, absente domino, pecuniam solverit; ne dominium quidem nummorum in eam speciem obligationis, quæ habuit auxilium exceptionis, translatum foret, si ex ea causa solutio facta proponeretur; quia non est vero simile dominum ad eam speciem solvendis pecuniis servum præposuisse, quæ solvi non debuerunt; non magis quam ut nummos peculiares ex causa fideiussionis, quam servus non ex utilitate peculii suscepit solveret.

(*b*) If one owes 40*l.* by bond, for the payment of 20*l.* at such a day, and 20*l.* by contract to the same person, payable the same day, and at the day he pays 20*l.* without telling for which it is, it shall be a payment in equity upon the bond, because that is most penal to him. *Anon. 12 Mod. 559.*

(*c*) Quod si forte à neutro dictum sit; in his quidem nominibus, quæ diem [vel conditionem] habuerunt, id videtur solutum, ejus dies venit.

(*d*) Cum ex pluribus causis debitor pecuniam solvit, Julianus elegantissime putat, ex ea causa eum solvisse videri debere, ex qua tunc cum solvebat, compelli poterit ad solutionem.

(*e*) So held, *Brownlow* 107. *Heyward v. Lomax*, *Vern.* 24. *Anon.* 8 *Mod.* 236. In *Goddard v. Cox*, before Lee, C. J. at N. P. 2d. Str. 1154. Where A, owed money as executrix

Corollary IV.

The application ought rather to be made to an hypothecatory debt than to another. *L. 97. (a) ff. de Solut.*

Corollary V.

The application ought rather to be made to the debt, for which the debtor had given sureties, than to those which he owed singly. *L. 4. (b) in fin. L. 5. ff. d. t.* The reason is, that in discharging it, he discharges himself from two creditors, from his principal creditor, and from his surety whom he is obliged to indemnify. Now, a debtor has more interest to be acquitted against two, than against a single creditor (c.)

Corollary VI.

The application ought rather to be made for a debt, of which the person who has paid was principal debtor, than to those which he owed as surety for other persons, *d. L. 97. L. 4. ff. d. t.*

All these corollaries may be subject to exceptions, which are left to the discretion of the judge.

For instance, although in general the application is to be made to the debt, which is due rather than to that which is not, nevertheless, if the other would become due in a few days, and may be enforced by arrest, I think it ought in the application to be pre-

executrix of B, and order money on her own account to C, and afterwards married D, who incurred a further debt to C, and made several payments generally, it was held by the Chief Justice, that as the defendant had not applied the money, the right devolved upon the plaintiff; and as the defendant by the marriage was equally liable for the debt incurred by the wife, *dum sola*, as for what was due from himself, the plaintiff might apply the money to discharge the wife's own debt; but as the demand against her as executrix depended on the assets, he was of opinion that the plaintiff could not apply any part of the money to that.

(a) Cum ex pluribus causis debitor pecuniam solvit, utriusque demonstratione cessante, potior habebitur causa ejus pecuniarum quæ sub infamia debetur, mox ejus, quæ pœnam continet, tertio, quæ sub hypotheca vel pignore contracta est: post hunc ordinem potior habebitur propria, quam aliena causa, veluti fidejussoris; quod veteres ideo definierunt, quod verisimile videretur diligentem debitorem admonitu ita negotium suum gesturum fuisse. Si nihil eorum interveniat, vetustior contractus ante solverur. Si major pecunia numerata sit, quam ratio singulorum exposcit, nihilominus primo contractu soluto, qui potior est, superfluum ordini secundo, vel in totum, vel pro parte minuendo videbitur datum.

(b) Et magis, quod meo nomine, quam quid pro alio fidejussoris nomine debeo, et potius quod cum pœna, quam quod sine pœna debetur: et potius quod satisfacto, quam quod sine satisfactione debeor.

In his vero, quæ præsentis die debentur, constat, quoties indistincte quid solvitur, in graviores causas videri solutum; si autem nulla prægravat (id est, si omnia nomina similia fuerint) in antiquiorem, gravior videtur, quæ [&] sub satisfactione videtur, quam ea, quæ pura est.

(c) This reason does not seem very satisfactory, for though there are two creditors, there is only one debt; the interest of the creditor to retain the obligations of the surety is much greater than that of the debtor to discharge him.

ferred to an ordinary debt, which is due at present ; for it was the interest of the debtor, rather to acquit a debt for which in a few days he would be subject to arrest, although the term of payment was not yet expired, than to acquit ordinary debts whose term was expired.

In like manner, although a payment is to be applied to a debt, which may be enforced by arrest, rather than to those purely civil ; yet, if the debtor was a person who from his dignity, and riches, might flatter himself that the creditor would not proceed by arrest against him, if this debt does not carry interest, the application should rather be made to a debt purely civil which does.

Fourth Rule.

[531] If the debts are of an equal nature, and such that the debtor had no interest in acquitting one rather than the other, the application should be made to that of the longest standing (a), *si nulla causa prægravit in antiquiorem. L. 5. ff. d. t.*

Observe, that of two debts contracted the same day, but with different terms, which are both expired, the debt of which the term was the shorter, and consequently which expired sooner, is understood to be the more ancient. *L. 89. (b) § 2. ff. hoc titulo.*

Fifth Rule.

[532] If the different debts are of the same date, and in other respects equal, the application should be made proportionately to each. “ *Si par et dierum, et contractuum causa sit, ex summis omnibus proportionem solutum.*” *L. 8. ff. de Solut. (c)*

Sixth Rule.

[533] In debts which are of a nature to produce interest, the application is made to the interest before the prin-

(a) This would, in most cases, render the rule that the creditor has the right of application, if not made by the debtor at the time of payment, a mere nullity : for it must be very seldom that the two debts become due at precisely the same time ; but where A. being in trade, owed B 100*l.* and after leaving off trade, borrowed 100*l.* more, and paid 100*l.* generally, it was held by *Holt. Cb. J.* that it should be applied to the former, so that the creditors should never charge him with a commission of bankruptcy for that which remained. *Comb. 463. Anon.*

See *supra*, n. 530.

(b) Lucius Titius duabus stipulationibus, una quindecim sub usuris majoribus, altera viginti sub usuris levioribus Seium eadem die obligavit, i a ut viginti prius solverentur ; id est, iudicibus Septembribus ; debitor post diem utriusque stipulationis cedentem, solvit viginti sex ; neque dictum est ab altero, pro qua stipulatione solveretur. Quæro, an quod solutum est, eam stipulationem exoneraverit, cujus dies antecessit ; id est, ut viginti sortis solutæ videantur et in usuras eorum sex data ? Respondit, magis id accipi, ex usu esse.

(c) A. was bound as surety for B. to C., and B. owed C. a further debt. An account was stated between B. and C., including both, and a bill of sale was made in satisfaction of the whole debt, and it was held that the money raised thereon should be applied towards both debts in proportion. The Lord Chancellor (after stating the general right of the creditor to elect) said, that as the payment was made pursuant to a preceding account of both debts, it should be so proportionately rated. *Perry v. Roberts, 2 Chanc. Cas. 84. Vid. St. art v. Rowland, Show. 216.*

cipal ;

cipal ; “ *primo in usuras, id quod solvitur, deinde in sortem, accepto fertur.*” *L. 1. Cod. h. t.*

This holds good even if the acquittance imported that the sum was paid to the account of the principal and interest, “ *in sortem et usuras.*” The clause is understood in this sense, that the sum is received to the account of the principal, after the interest is satisfied. *L. 5. (a) § fin de Solut.*

Observe, that if the sum paid exceeds what is due for interest, the remainder is applied to the principal, even if the application had been expressly made to the interest, without mentioning the principal. *L. 102. (b) § fin. ff. de Solut.*

This decision ought to be understood, with reference to a principal which can be demanded. But if the debtor of an annuity had paid more than he owed for the arrears, he would have a repetition for such surplus, and could not insist upon having it applied to the principal of the annuity ; for, properly speaking, the principal of an annuity is not due ; it is only *in facultate solutionis*, and the creditor is not presumed to have consented to the annuity being redeemed in part.

[534] The rule which we have established, that the application ought to be made to the interest before the principal, does not hold with regard to interest due by a debtor, from the time of a judicial demand being made, as a penalty for his delay ; such interest is awarded by way of damages, and forms a distinct debt from the principal ; and what the debtor pays, is applied rather to the principal than to this interest, according to the third corollary above stated. This is established by an *arrêt* of 1649, and another of 1706.

[535] When the creditor pays himself out of the price of a thing, which was hypothecated to him, and which he has sold, the application is to be directed by other rules than those above established (c).

First Rule.

The first rule is, that the application ought in this case to be

(a) Apud Marcellum, lib. 20. Digestorum, queritur, si quis ita caverit debitori, *in sortem et usuras se accipere*, utrum pro rata et sorti, et usuris decedat ; an vero prius in usuras, et si quid superest, in sorte ? Sed ego non dubito, quin hæc cautio *in sortem et in usuras*, prius usuras admittat ; tunc deinde, si quid superfuerit, in sortem cedat.

(b) Titius mutuam pecuniam accepit, et *quincunces usuras* spondit, easque paucis annis solvit, postea nullo pacto interveniente, per errorem et ignorantiam semisses usuras solvit. Quæro, an patet facto errore, id, quod amplius usurarum nomine solutum esset, quam in stipulatum deductum, sortem minueret ? Respondit, si errore plus in usuris solvisset, quam deberet, habendam rationem in sortem ejus quod amplius solutum est.

(c) A creditor by judgment, and also by bond, receives 200*l.* of the purchaser of the estate of the debtor, but gives no notice to the debtor that it was to be applied towards the payment of the bond debt ; and *per curiam*, it shall be applied towards satisfaction of the judgment, being part of the purchase money. *Brett v. Marsh, Vern. 468.*

made rather to the debt for which the thing was hypothecated, than to others for which it was not, whatever interest the debtor may have had to acquit the former rather than the latter. *L. 101.*

(a) § 1. *ff. de Solut.*

When the debt for which the thing was hypothecated carries interest, the creditor may make the application to the interest, before the principal. *L. 48. (b) d. t.*

Second Rule.

When the thing was charged as a security for different debts, the application is made to that whose right of hypothecation is strongest; for instance, to a privileged debt rather than to a simple hypothecation. Among simple hypothecations, the application will be made to the debt of which the hypothecation was the most ancient. If the rights of hypothecation were equal, the application should be made to all by contribution, *pro modo debiti. L. 96. (c) §. 3. ff. d. t.*

A R T I C L E. VIII.

Of Consignation and Offers of Payment.

[536] Consignation is a deposit which a debtor makes of the thing that he owes into the hands of a third person, and under the authority of a court of justice.

[537] Consignation is not properly a payment, for a payment essentially includes a transfer of property in the thing which is paid; whereas it is evident that a consignation does not transfer the thing consigned to the creditor, who can only acquire a property by voluntarily receiving it, *Dominium non acquiritur nisi corpore et animo*. But although the consignation, made upon the re-

(a) *Paulus respondit, aliam causam esse debitoris solventis, aliam creditoris pignus distrahentis. Nam cum debitor solvit pecuniam, in potestate ejus esse commemorare, in quam causam solveret; cum autem creditor pignus distraheret, licere ei pretium in acceptum referre, etiam in eam quantitatem, quæ natura tantum debebatur; et ideo deducto eo, debitum peti posse.*

(b) *Titia cum propter dotem bona mariti possideret, omnia pro domina egit, reditus exegit et moventia distraxit; quæro an ea, quæ ex re mariti percepit, in dotem ei reputari debeant? Marcellus respondit, reputationem ejus, quod proponeretur, non iniquam videri: pro soluto enim magis habendum est, quod ex ea causa mulier percepit; sed si forte usurarum quoque rationem arbiter dotis recuperandæ habere debuerit, ita est computandum, [ut] prout quidque ad mulierem pervenit, non ex universa summa decedat; sed prius in eam quantitatem, quam usurarum nomine mulierem consequi oportebat; quod non est iniquum.*

(c) *Cum eodem tempore pignora duobus contractibus obligantur, pretium eorum pro modo pecuniæ cujusque contractus creditor accepto facere debet; nec in arbitrio ejus electio erit, cum debitor pretium pignoris consortioni subjecerit, quod si temporibus discretis superfluum pignorum obligari placuit: prius debitum pretio pignorum jure solvetur, secundum superfluo compensabitur.*

fusal of the creditor, is not an actual payment, it is equivalent to a payment, and extinguishes the debt no less than if an actual payment had been made; *obligatione totius debite pecunie solemniter facta liberationem contingere manifestum est. L. 9. cod. de Solut.*

[538] To render the consignation valid, and equivalent to a payment it is necessary, *qu'il n'ait pas tenu au débiteur de payer au créancier*, and that the creditor should be placed *en demeure*, by an effectual offer of payment.

An offer, to be effectual, must be made to the creditor himself, if he has a capacity of receiving; if not, to the person who has the quality of receiving on his behalf, as his tutor, or curator, &c.

If there is a person indicated by the contract to whom the payment may be made, the offer may be made to that person: for, the debtor having a right of paying to him by the terms of the agreement, it is a necessary consequence that he is not obliged to go elsewhere in search of the creditor.

[539] 2d, It must be made by a person capable of paying; for a person who has not a capacity to pay, has not a capacity to offer a payment.

[540] 3d, The offer must be of the entire sum, unless a liberty is expressly given of paying by instalments, otherwise the creditor, who is not obliged to receive his debt by parts, is not placed *en demeure*.

[541] 4th, When the debt is contracted under a condition, the condition must have taken place, and if there is any term stipulated in favour of the creditor, that term must have expired: for, as long as the creditor is not under any obligation to receive, no delay can be imputed to him.

[542] 5th, The offer must be made at the place appointed for the payment, *ita demum oblatio debiti liberationem parit, si eo loco quo debetur solutio fuerit celebrata. L. 9. cod. de Solut.* Therefore, if money is payable to a creditor in his dwelling house, an offer cannot be effectively made elsewhere; if the payment is to be made at some other place, the creditor may be required to appoint a particular spot, as his domicile there, for the purpose.

If the thing which is due is a specific article, to be delivered at the place where it is, there may be a summons to take it away, which is equivalent to an offer of payment; and thereupon the debtor may obtain an order from the judge to deposit it in another place, if he wants to occupy his own rooms in a different manner.

[543] A formal act must be prepared of these proceedings, and of the summons before a judge, for the purpose of directing a consignation. The summons is to appear immediately, and the judge thereupon directs a consignation, assigning the creditor.

ditor to be present at such consignment, at a time and place particularly specified.

But the previous order of the judge is not absolutely necessary; the summons may merely specify that the consignment will be made at a particular time and place; and a consignment made accordingly, and duly notified, is valid, and the subsequent judgment and confirmation has a retrospective effect, to the time of the consignment.

[544] Such a consignment ought to be made at the time and place indicated, and of the entire sum due unless there is a special provision for paying it up by parts.

[545] The effect of a consignment, if it is adjudged to be valid, is that the debtor is thereby absolutely discharged; and although *subtilitate juris*, he continues to be the owner of the things consigned, until they are taken away by the creditor, they are no longer at his risk, but at that of the creditor, who from being a creditor of a certain amount generally, becomes the creditor of the particular articles which are so consigned, *tanquam certorum corporum*: and he is no longer the creditor of his original debtor, who is entirely liberated, but of the consignatory, who obliges himself by a quasi-contract, to deliver the articles in his custody to the creditor, if the consignment is adjudged good, or to the debtor if it is declared to be null.

Hence it follows, that any augmentation or diminution in the value of the money which may be consigned, enures to the profit or loss of the creditor, if the consignment is valid; for wherever the debt is of a specific thing, it is at the risk of the creditor; if the consignment is invalid, the debtor takes the articles back as he finds them.

Supposing an augmentation to take place in the value of money subsequent to the consignment, the debtor cannot, with a view to taking advantage of it, withdraw the monies consigned, and insist upon the consignment being void, for no man can contradict his own act. Any forms which the debtor may have omitted to observe, being established in favour of the creditor, the creditor alone has a right to object to an irregularity in the proceeding.

There is a further question: supposing the consignment to have been regularly made, and the debtor to have afterwards withdrawn the money consigned, whether the consignment is to be regarded as never having been made so far as relates to joint debtors and sureties? In support of the negative proposition, it may be said, that the consignment having been regularly made, extinguishes the debt, and discharges all who were under any obligation; that the sureties and joint debtors having been liberated, it shall not be in the power of the debtor making the consignment, by withdrawing the things consigned, to revive an obligation which had become extinct.

tinēt. An argument is drawn from the law *Fin. ff. de pact.* (a) which decides that where a debtor by a *pactum de non petendo*, with his creditor, has acquired an exception in favour of himself and his sureties, he cannot, by renouncing the pact upon a subsequent agreement, deprive his sureties of the benefit of the exception. Much less, it is said, shall it be in his power to revive the obligation, from which the sureties have been absolutely discharged by consignation. It is further urged, that since after a real payment which extinguishes the debt, a voluntary restitution of the money by the creditor to the debtor will not revive the debt; upon the same principle, after a consignation which operates as a payment, and has the same effect of extinguishing the debt, a restitution to the debtor of the money consigned shall not revive the obligation. Notwithstanding these reasons there is a decision of 1624, reported by *Basset* IV. 21, 2. that the consignation should be considered as never having taken place, and that the sureties should continue liable. *Basset*, who reports this determination, assigns as a reason for it, that the consignation which extinguishes the debt is not a momentary consignation, but one *quæ in suo statu manserit*, and not withdrawn by the debtor. But may it not be replied, that this is merely begging the question? For it is the very point in discussion, whether a debtor who has made a regular consignation may withdraw it to the prejudice of his sureties. I think a distinction should be made as to whether the consignation is withdrawn before it is ordained, or confirmed by the judge, or after. In the first case I think that the consignation should be deemed not to have taken place, and the sureties consequently would not be discharged: for, the act of consignation not being in itself equivalent to a payment, it is the sentence of the judge which gives it that effect, and extinguishes the debt. It is agreed that the sentence has a retrospective operation, and the consignation which it confirms, has the effect of extinguishing the debt from the instant of its being made. But a consignation neither ordained or confirmed by the judge, and withdrawn by the debtor, can neither extinguish the debt or liberate the sureties, and should be regarded as no consignation at all. In the second case, where the money consigned is not withdrawn until after sentence, I think that it ought not to prejudice the sureties, or joint debtors who have been fully liberated (b).

CHAP.

(a) Si reus, postquam pactus sit a se non peti pecuniam, (ideoque cepit id pactum fidejussori quoque prodesse) pactus sit, ut a se peti liceat, an utilitas prioris pacti sublata sit fidejussori, quaesitum est? Sed verius est, semel adquisitam fidejussori pacti exceptionem, ulterius [ei] invito extorqueri non posse.

(b) There is no judicial proceeding in *England* analogous to a consignation; but a tender to the creditor is, in many respects, similar in its effects.

By

CHAPTER II.

Of Novations.

This chapter will be divided into six articles ; we shall see in the first, what a Novation is, and its several kinds ; in the second, we shall treat of the debts which may be the subject of a Novation ; in the third, of the persons who may make a Novation ; in the fourth, in what manner it is made ; in the fifth, of its effect ; and in the sixth, of Delegation, which is a particular kind of Novation.

ARTICLE I.

Of the Nature of a Novation and its several kinds.

[546] A Novation is a substitution of a new debt for an old.

The old debt is extinguished by the new one contracted in its stead, for which reason, a novation is included amongst the different modes, in which obligations are extinguished (a.)

A no-

By tendering the money which is due from him, the debtor is discharged from further interest ; and if an action is brought against him he is intitled to costs, but he must still pay the debt due from him at the time of the tender ; and the effect of the tender is avoided, if the money is not paid upon a subsequent demand. The tender must be of the whole sum which is due, and the money must be actually produced, but it is sufficient to produce it in bags.

In consequence of a temporary pressure, a person cannot be arrested who has made a tender in bank notes ; and the act of parliament contains the provision, that in the oath which is the foundation of an arrest, such a tender must be distinctly negatived. As it was not probable that such a provision, introduced *sub silentio* in a voluminous act of parliament, would be immediately known to the public, many persons were liberated from custody in consequence of it, by not one of whom any such tender had in all likelihood been made.

In respect to other acts than the payment of money, the person who is under an obligation to do any act must perform it at his peril, unless the act requires the concurrence of the other party, and then he must do every thing which can be done without such concurrence ; but if the plaintiff discharges the defendant from doing the act, it is a sufficient excuse ; and upon the same principle, where the obligation of one of the parties is to arise upon a performance of the obligation of the other, the right of the latter arises upon a discharge by the former, in the same manner as in cases of actual performance. See the discussion of this subject in *Jones v. Berkely*, Doug. 684.

(a) It is a settled principle in the law of *England*, that a mere agreement to substitute any other thing in lieu of the original obligation, is void, unless actually carried into execution, and accepted as satisfaction. No action can be maintained upon the new agreement, nor can the agreement be pleaded as a bar to the original demand. See *Lynn v. Bruce*, 2 H. Blackstone, 317. *James v. David*, 5 T. R. 141., and the cases there cited. If divers things are to be performed by the accord, the performance of part is not sufficient, but all ought to be performed, 9 Co. 79. B. The ground of this principle is, that *interfectio rei publice*

at

[547] A novation may be made in three different ways, which form three different kinds of novations.

The first takes place, without the intervention of any new person, where a debtor contracts a new engagement with his creditor, in consideration of being liberated from the former. This kind has no appropriate name, and is called a novation generally.

[548] The second is that which takes place by the intervention of a new debtor, where another person becomes a debtor in my stead, and is accepted by the creditor, who thereupon discharges me from it. The person thus rendering himself debtor for another, who is in consequence discharged, is called *expromissor*; and this kind of novation is called *expromissio*.

The *expromissor* differs entirely from a surety, who is sometimes called in law, *adpromissor*. For a person by becoming a surety does not discharge, but accede to, the obligation of his principal, and becomes jointly indebted with him.

[549] The third kind of novation takes place by the intervention of a new creditor, where a debtor, for the purpose of being discharged from his original creditor, by the order of that creditor, contracts some obligation in favour of a new creditor.

There is a particular kind of novation called a delegation, which frequently includes a double novation: we shall treat of this in Article VI.

ut sit finis litium: that accord executed is satisfaction; accord executory is only substituting one cause of action in the room of another, which it is said may go on to any extent. *James v. David, ub. sup.* But what substantial reason there is for considering this as a ground of objection, independent of authority, or why it should not be competent to parties, by mutual agreement, to substitute one cause of action, as well as one payment, for another, it is not easy to perceive.

But where an engagement is entered into by deed, that deed gives, in itself, a substantive cause of action, and the giving such deed may be a sufficient accord and satisfaction for a simple contract debt. *Vide Roades v. Barns, 1 Bur. 9. Co. Lit. 212. B.* There are several cases in which the giving a bill of exchange was held to be a sufficient payment. *Vide Kearlake v. Morgan, 5 T. R. 513.* and the cases there cited. *Vide also Louviers v. Laubray, 10 Mod. 36.* And a promissory note is upon the same footing with a bill of exchange. It certainly is highly reasonable that the law should be so considered, because such a bill or note is a direct and full cause of action, not only to the party to whom it is so given, but also to any other holder. But in *Drake v. Mitchell, 1 East. 251.* upon covenant against three, for non-payment of money, the defendants pleaded that one of them had given a promissory note, upon which the plaintiff had judgment, and it was held that this was no defence; the ground of the decision was, that it was not stated that the note was accepted in satisfaction; but it was said by Lord *Ellenborough*, that one may agree to accept of a different security in satisfaction of his debt.

If another person engages in lieu of the original debtor, and it is agreed that in consideration thereof the original debtor shall be discharged, (which kind of engagement is the same with that hereafter discussed, under the name of Delegation) it is a matter of familiar practice that this shall be regarded as a payment, and operate as a discharge.

See however *Lobby v. Gildart, 3 Lev. 55.* See also *Cumber v. Wane, Str. 426.* *Heathcote v. Grootshanks, 2 T. R. 24.* *Hardcastle v. Howard, cited ibid.*

ARTICLE II.

Of the Debts necessary to constitute the Subject of a Novation.

[550] It results from the definition which has been given, that there can be no novation without two debts being contracted, one of which is extinguished by the substitution of the other.

It follows that if the debt, of which it is proposed to make a novation by another engagement, is conditional, the novation cannot take effect until the condition is accomplished. *L. 8. (a) § 1. de Novat.*

Therefore, if there is a failure in the accomplishment of the condition, there can be no novation, because there is no original debt to which the new one can be substituted.

Also, if the conditional debt, of which it is intended to make a novation by a new engagement, is a specific thing, which has been destroyed or perishes, before the condition is accomplished, there will be no novation even if the condition should exist : for, since the accomplishment of the condition cannot confirm a debt of a thing which has no existence, there is no original debt to which the new one can be substituted.

[551] *Vice versa*, if the first debt does not depend on any condition, but the second engagement, intended as a novation, is conditional, the novation can only take effect by the accomplishment of the condition of the new engagement, before the first debt is extinct.

Therefore a novation is prevented from taking place, not only upon failure of the condition, but also upon the extinction of the original debt before the condition is accomplished, as for instance, by an extinction of the thing which forms the object of it ; for the accomplishment of the condition cannot induce the novation of a debt no longer in existence. *L. 14. (b) ff. de Novat.*

[552] A mere term for payment is very different from a condition ; the debt exists though the term of credit is not

(a) Legata vel fideicommissa, si in stipulationem fuerint deducta, et hoc actum, ut novetur, fiet novatio, si quidem pure vel in diem fuerint relicta, statim : si vero sub conditione, non statim, sed ubi conditio extiterit. Nam et alias qui in diem stipulatur, statim novat, si hoc actum est ; cum certum sit diem quandoque venturum, at qui sub conditione stipulatur, non statim novat, nisi conditio extiterit.

(b) Quoties quod pure debetur, novandi causa sub conditione promittitur ; non statim fit novatio ; sed tunc demum, cum conditio extiterit. Et ideo si forte Stichus fuerit in obligatione, et pendente conditio decesserit, nec novatio contingit ; quia non subest res eo tempore, quo conditio impletur. Unde Marcellus, etsi post moram Stichus in conditionalem obligationem deductus sit, purgari moram, nec in sequentem deduci obligationem, putat.

expired ; therefore, a novation may be made of a debt payable at a future day, by a pure and simple engagement, or of a pure and simple engagement by another engagement allowing a term of credit ; and in either case, the novation takes effect from the first, without waiting for the expiration of the term. *L. 5. (a) L. 8. § 1. (b) ff. de Novat. (c)*

[553] It is indeed of the essence of a novation, that there be two debts contracted, an original debt and another substituted in its room ; but it is sufficient if the first precedes the second, by an imaginary point of time. The novation may take place the same instant in which the first obligation is contracted.

For instance, you sell me an estate for a thousand pounds ; by the same contract, a third person engages to pay you that sum, and you accept him for your debtor. It may be conceived that during an imaginary point, there exists a debt from me of which there is a novation, by the engagement of the third person. Although there is no space of time in which any debt from me really exists, there is a novation which takes place the same instant that the debt is contracted. See another instance. *L. 8. (d) § 2. ff. de Novat.*

[554] The novation is valid, whatever may be the nature of the first debt, or of that substituted in its place ; *non in-*

(a) In diem obligatio novari potest, et priusquam dies advenerit. Et generaliter constat, et stipulatione in diem facta novationem contingere, sed non statim ex eâ stipulatione agi posse, antequam dies venerit.

(b) Legata vel fideicommissa, si in stipulationem fuerint deducta, et hoc actum ut novetur ; fiet novatio, si quidem pure vel in diem fuerint relicta, statim ; si vero sub conditione non statim, sed ubi conditio extiterit. Nam et alias qui in diem stipulatur, statim novat, si hoc actum est, cum certum sit diem quandoque venturum ; at qui sub conditione stipulatur, non statim novat, nisi conditio extiterit.

(c) There is a subtlety in these distinctions which should preclude our assent to them if they are considered otherwise than as mere rules of positive law. They are founded upon too strict an application of the rule, that a failure in the accomplishment of a condition, induces the absolute nullity of the engagement ; whereas a conditional obligation, whilst it is capable of taking effect, is still a real obligation, and there is nothing unreasonable in admitting the dissolution of it as a ground of compensation. Nor, on the other hand, is it unreasonable that an absolute engagement of a small amount, may be compensated by a conditional obligation of a large amount ; or a case may be put of substituting one conditional engagement for another. For instance, I owe you 100*l.* upon a bottomry bond, which depends upon the arrival of my ship *Cæsar*, and is of course conditional ; it is agreed that that debt shall be abandoned, but that I shall in lieu thereof engage by way of insurance, to pay you 500*l.* upon the loss of your ship *Hæstor*. The insurance must be paid, though by the loss of the *Cæsar* the obligation of bottomry never took effect ; and the bottomry bond is extinguished, though by the safe arrival of the *Hæstor* nothing is due upon the insurance.

(d) Si quis ita stipulatus a Seio sit, Quod a Titio stipulatus fuero, dare spondes ? an, si postea a Titio stipulatus sim, fiat novatio, solusque teneatur Seius ? Et ait Celsus novationem fieri, si modò id actum sit, ut novetur ; id est, ut Seius debeat quod Titius promisit, nam eodem tempore, et impleri prioris stipulationis conditionem, et novari ait ; eoque jure utimur.

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terest qualis precessit obligatio, seu civilis seu naturalis, qualiscunque sit novari potest, dummodo sequens obligatio, aut civiliter teneat, aut naturaliter. L. 1. § 1. ff. de Novat. (a)

But they must not be obligations which the law reprobates and annuls; for these cannot produce any effect. *V. supra, p. 2. ch. 2.*

A R T I C L E III.

What Persons may make a Novation.

[555] The consent which the creditor gives to the novation of the debt, being equivalent, so far as regards the extinction of the debt, to a payment of it; it follows, that only those to whom a valid payment may be made, can make a novation of a debt.

Therefore, for the same reason that a valid payment cannot be made to a minor, to a wife not authorized by her husband, to an interdict; it ought to be decided, that such persons cannot make a novation of what is due to them. *L. 3. (b) L. 20. (c) § 1. ff. d. t.*

[556] *Vice versâ*, a person to whom a debt may be paid may likewise in general make a novation: *cui recte solvitur, is etiam novare potest. L. 10. ff. de Novat.*

Hence it follows, that any one of several creditors in solido may make a novation. *Venuleius* so decides. *L. 31. (d) § 1. ff. de Novat. et Deleg.* which decision as it appears to me ought to be followed, although *Paulus* is of a contrary opinion. *L. 27. (e) ff. de Pactis.* The interpreters have endeavoured in vain to reconcile them. See *Wissembach, ad. Tit. de Novat. 10.*

(a) This is consonant to the admitted principle of the *English* law, that a preceding moral obligation is a sufficient consideration for a promise.

(b) Cui bonis interdictum est, novare obligationem suam non potest, nisi meliorem suam conditionem fecerit.

(c) Pupillus sine tutoris auctoritate non potest novare; tutor potest, si hoc pupillo expediat; item procurator omnium bonorum.

(d) Si duo rei stipulandi sint, an alter jus novandi habeat, queritur; et quid juris unusquisque sibi adquisierit? Fere autem convenit, et unum recte solvi, et unum judicium petentem totam rem in litem deducere; item unius acceptilatione perimi utriusque obligationem; ex quibus colligitur, unumquemque perinde sibi adquisisse, ac si solus stipulatus esset; excepto eo, quod etiam factum ejus, cum quo commune jus stipulantis est, amittere debitorem potest. Secundum quæ, si unus ab aliquo stipulatur; novatione quoque liberare eum ab altero poterit, cum id specialiter agit, eo magis cum eam stipulationem similem esse solutioni existimemus, alioquin, quid dicemus, si unus delegaverit creditori suo communem debitorem,isque ab eo stipulatus fuerit.

(e) Si unus ex argentariis sociis cum debitore pactus sit, an etiam alteri noceat exceptio? *Neratus, Atilicinus, Proculus*, nec si in rem pactus sit, alteri nocere; tantum enim constitutum, ut solidum alter petere possit. Idem *Labeo*; nam nec novare alium posse, quamvis ei recte solvatur. Sic enim et his, qui in nostra potestate sunt, recte solvi quod crediderint, licet novare non possint; quod est verum. Idemque in duobus reis stipulandi dicendum est.

[557] In like manner a tutor, a curator, a husband may make a novation. *L. 20. (a) § 1. L. fin. (b) § 1. ff. d. t.* As may also a person having a general procuration from the creditor. A person who has only a particular power to receive from the debtors cannot, because his power being limited to receive, *non debet egredi fines mandati*. It is the same with those persons called *adjecti solutionis gratia*, of whom we have spoken in the preceding Chapter, Art. II. § 4. they cannot make a novation. *L. 10. (c) ff. de Solut.* although a valid payment may be made to them.

ARTICLE IV.

In what Manner a Novation is made.

§ I. *Of the Form of a Novation.*

[558] By the *Roman* law, a novation could only be made by stipulation; the form of a stipulation is not in use in our law; mere agreements have the same force as a stipulation had in the *Roman* law, therefore a novation is made by a mere agreement.

§ II. *Of the Intention to make a Novation.*

[559] In order to constitute a novation, the consent of the creditor, or of some person having authority from him, or a quality to make a novation for him, is requisite.

By the ancient *Roman* law, such consent might easily be presumed; but according to the constitution of *Justinian*, in the last law (*d) cod. de Novat.* such intention should be positively declared, without which there could be no novation; and the new engagement which is contracted, is to be considered rather as having been made to confirm and accede to the first, than to extinguish it.

The reason of this law is, that a person should not easily be presumed to abandon the rights which belong to him. Therefore, as a novation implies an abandonment by the creditor of the first claim,

(a) See *supra*, n. 555.

(b) Adgnatum furiosi, aut prodigi curatorem, novandi jus habere minime dubitandum est, si hoc furioso vel prodigo expediat.

(c) Quod stipulatus ita sum, *MINI AUT TITIO*? Titius nec petere, nec novare, nec acceptum facere potest, tantumque ei solvi potest.

(d) Si quis vel aliam personam adhibuerit, vel mutaverit, vel pignus acceperit, vel quantitatem augendam, vel minuendam esse crediderit, vel conditionem seu tempus addiderit, vel detraxerit, vel cautionem minorem acceperit, vel aliquid fecerit, ex quo veteris juris conditores introducebant novationes; nihil penitus prioris cautelae innovari, sed anteriora stare, et posteriora incrementum illis accedere; nisi ipsi specialiter remiserint quidem priorem obligationem, et hoc expresserint, *quod secundum magis pro anterioribus elegimus*.

to which the second is substituted, it ought not to be easily presumed, and the parties ought expressly to state it.

Nevertheless, in our jurisprudence we have not adopted this law in so literal a manner as to require that the creditor should always declare in precise and formal terms, that he intends to make a novation; it is sufficient, that his intention, in whatever manner expressed, should be so evident as not to admit of doubt. This is established by *D'Argentrè*, upon the Art. 273, of the Ancient Custom of *Brittany*. For instance, I am a creditor of *Peter* for a sum of 1000*l.* an act passes between *James*, the debtor of *Peter*, and me, by which it is declared, that *James* obliges himself in my favour to pay me the 1000*l.* which is due to me by *Peter*; and it is added, that I have, as a favour to *Peter*, (*pour faire plaisir a Pierre*) agreed to be satisfied with the present obligation which *James* has entered into with me; it ought to be decided in this case, that there is a novation, and that *Peter* is discharged against me, although it be not said in precise and formal terms, that I discharge *Peter*, and accept the obligation of *James*, as a novation for that of *Peter*. For the terms which I have used as a favour to *Peter*, sufficiently indicate my intention of discharging *Peter*, and taking *James*.

But unless the intention evidently appears, a novation is not to be presumed. Therefore, if I attach the goods of *Peter* in the hands of *James*, and *James* merely undertakes to pay the money due to me from *Peter*, without any expression on my part of taking the security for the sake of *Peter*, or some other intimation, which renders it evident that I intend that *Peter* shall be discharged, it will not be considered as a novation, but *James* will be only deemed to have acceded to the obligation of *Peter*, who continues bound as my debtor. This was adjudged by an *arrêt* of the Parliament of *Toulouse*, reported by *Catelan*, vol. 2. l. 5. ch. 38 (a).

So if, subsequent to the contracting of a debt, some act passes between the debtor and creditor, allowing a further time, or appointing a different place for payment, or authorising a payment to some other person than the creditor, or agreeing to take something else in lieu of the sum due, or by which the debtor engages to pay a larger sum, or the creditor to accept a smaller; in these and

(a) Upon this principle it was held by the Court of King's Bench, in *White v. Cuyler*, 6 T. R. 176. that the undertaking of a surety by deed did not extinguish the obligation of the principal debtor. And in the case of *Hamilton v. Cullenden*, in the Supreme Court of *Pennsylvania*, it appeared that *Cullenden* gave the plaintiff a mortgage and bond; that *Cullenden's* executors afterwards sold the equity of redemption to *Bird*, who gave his bond to the plaintiff for the amount of the principal and the interest then due, which was ruled to be no discharge of the preceding bond. The discussion, as is usual in the American Courts, turned principally upon the authorities of the English law. 3 *Dallas' Reports*, 420.

similar cases, according to the principle that a novation is not to be presumed, it should be decided, that no novation had taken place, and that the parties intended only to modify, augment, or diminish, the obligation, and not to extinguish the old debt, and substitute a new one, unless the contrary is particularly expressed.

§ III. *Whether the granting an Annuity for the Price of a Sum due by the Grantor, necessarily includes a Novation?*

If, by an agreement between the creditor and a debtor of a sum of money, the debtor has granted an annuity to his creditor, for the sum which he owed to him, will there in this case necessarily be a novation? Several writers maintain that there is no novation in this case, where the parties have not so declared; and *a fortiori*, if they have expressly declared by the instrument, that they did not intend to make any novation; they contend that by the constitution (a) of the annuity, the creditor does not give a discharge of the sum due to him, that he only consents not to demand the sum, provided the interest of it is paid to him; consequently, that the old debt always subsists, although, under a new modification, that is to say, that instead of being demandable as formerly, it is become a debt of which the principal is alienated, and can no longer be demanded, so long as the debtor pays the annuity.

This opinion appears to me to be subject to much difficulty; it is the essence of the constitution of an annuity, that the person who grants the annuity should receive the price of it; if, then, my debtor of a certain sum, as a thousand pounds, in consideration of that debt grants me an annuity of fifty pounds, it is necessary that he should receive the sum of a thousand pounds for the price of the annuity; and he can only be supposed to have received it by having a discharge from the former debt as a consideration for the annuity; the constitution of the annuity therefore includes a discharge from me of this sum; it includes a compensation of the sum, of which he was my debtor, with a like sum which I was to give him for the price of the annuity; now it is evident, that such discharge and compensation extinguish the debt, and form a novation.

It cannot be said, that the principal of the annuity is my old debt, which continues to subsist under a new modification of the principal of the annuity, instead of being a debt which might be demanded as before: for, besides its being extinguished by the constitution of the annuity, as we have just shewn, the right acquired is that of an annual payment, which runs on for ever,

(a) The granting an annuity is expressed by the terms *constitution de rente*.

until redeemed, rather than of the principal, which, as it cannot be demanded, is not properly due, and is *in facultate solutionis magis quam in obligatione*.

These reasons appear conclusive for deciding that an act, by which the debtor of a certain sum grants an annuity to his creditor, in consideration of such sum, necessarily includes a novation, even if it were expressed in the act, that it was not the intention of the parties to make a novation; for a protestation cannot prevent the essential and necessary effect of an act. Therefore, this clause appears to me to be capable of no other effect than to prevent the extinction of the hypothecations of the old debt, and to transfer them to the new, as may be done according to the law 12. § 5. ff. *qui potior* (a).

Although these reasons appear to me very strong to decide that the act, by which a debt, which may be demanded and converted into the purchase of an annuity, essentially contains a novation; nevertheless, the contrary opinion appears to have the suffrages of authors in its favour: it is authorised by two *arrêts*, which are said to have decided the question; the first, of the 13th April, 1683, is reported in the *Journal du Palais*, tom. 2. edition in folio.

In that case, *Ligondez*, a debtor in solido with *Sablon*, of the sum of 6000 livres, had afterwards constituted an annuity for it, as well in his own name, as on behalf of *Sablon*, and the contract contained a reservation of the obligation and the hypothecations; the creditor having assigned *Sablon* to execute the contract of constitution, or to pay the sum of 6000 livres, *Sablon* was adjudged to do so; the reporter infers from this *arrêt*, that it was decided that a debtor of a sum of money might constitute an annuity for such sum, without making a novation of his debt. But I think the consequence is not well drawn, and that the respective arguments of the parties, mentioned in the *Journal*, do not come to the point of the decision of the cause; the true reason for which *Sablon* was adjudged to pay, or to execute a contract of constitution, appears to me to be, that *Ligondez* having executed a contract, as well in his name as on behalf of *Sablon*, and consequently, the creditor only having consented to the conversion of his debt of 6000 livres into an annuity, upon condition that the contract should be executed by both the debtors; the conversion of the debt into an annuity, and the novation and extinction of that debt which were to result from it, depended upon this condition; therefore, as the refusal of

(a) “ Si prior creditor postea, novatione facta, eadem pignora cum aliis acceperit, in suum locum eum accedere; sed si secundus non offerat pecuniam, posse priorem vendere, ut primam tantum pecuniam expensam ferat, non etiam quam postea credidit: & quod superfluum ex anteriore credito accepit, hoc secundo restituat.”

Sablon to execute the contract, amounted to a failure of the condition, there was not any novation, the debt subsisted, and *Sablon* was rightly adjudged to pay.

The other *arrêt* is of the 6th September, 1712, and is contained in the 6th volume of the *Journal des Audiences*. In this case, three several persons had contracted, in solido, an obligation to pay a certain sum; two had actually paid each their third, and the creditor, upon receiving it, reserved the right of solidity; *Lebegue* and *De Villemenard* had, by a note, promised to constitute an annuity for the remaining third, and it was said in the note, *without prejudice to the right of solidity*: a long time afterwards, the creditor assigned *Montpensier*, one of those who had paid their third parts, subject to the reservation of solidity, to pay the remainder, or to accede to the constitution of the annuity, and he was adjudged to do so. Then, it is argued, it was decided, that the constitution of an annuity, by a debtor, did not necessarily induce a novation and the extinction of the debt; otherwise, in the foregoing case, *Montpensier* the co-debtor in solido of the sum which remained due, and for which the annuity was constituted, would have been liberated from the debt, and would not have been adjudged by the *arrêt* to pay it.

I do not know what the reason was upon which the decision of the *arrêt* was founded; but in support of our principles, it may be said, that the *arrêt* did not decide what has been inferred, but rather decided that by the clause of reservation the creditor was considered as having only consented to the conversion of the debt into an annuity, upon the condition that all the other debtors in solido should accede to the contract for the annuity, and consequently, the refusal of *Montpensier* to accede to it having defeated the condition, the debt continued to subsist,

§ IV. *Of the Necessity of there being some Difference between the new Debt and the old.*

[560] When there is a new agreement made between the same creditor and the same debtor, without the intervention of any new person; although it be expressly declared by the act, which contains the new engagement, that the parties intend making a novation; to render it a valid novation, it is necessary that the act should contain something different from the former obligation; either in the quality of the obligation, as if the former were determinate, and the second alternative, *aut vice versa*; or in the accessory parts of the obligation, as the place of payment. It is also a sufficient difference, if the former obligation were contracted with the security of another person, or under an hypothecation,

and by the new one I engage without a surety, without hypothecation; *aut vice versa*.

If the new engagement, made without the intervention of another person, does not contain any thing different from the first, it is evident that the contracting of it is of no signification. *Instit. tit. (a) quib. mod. tol. obl. § 4.*

[561] When the novation is made with the intervention of a new debtor, or of a new creditor, the difference of the creditor or debtor is in itself, and without any other difference, sufficient to form a proper novation.

§ V. *Whether the Consent of the former Debtor is essential to a Novation.*

[562] A novation made with the intervention of a new debtor, may be made between the creditor and the new debtor, without the first, whose debt is to be thereby extinguished, concurring in it, or consenting to it. *Liberat me is, qui, quod debeo, promittit, etiamsi nolim. L. 8. § 5. ff. de Novat.*

The reason is, that the novation, so far as it affects the former debtor, amounts only to a discharge from his debt, by the new engagement which the third person contracts in his place; now one person may discharge the debt of another, without his assent, as we have seen in the preceding chapter. *Ignorantis enim et inviti conditio melior fieri potest. L. 53. de Solut.*

ARTICLE V.

Of the Effect of a Novation.

[563] The effect of a novation is, that the former debt is extinguished in the same manner as it would be by a real payment.

Where one of several debtors in solido alone contracts a new engagement with the creditor, as a novation of the former debt, the first debt being extinguished by the novation, in the same manner as it would have been by a real payment, all his co-debtors are equally liberated with himself. And as the extinction of a principal obligation induces that of all accessory obligations, the novation of the principal debt extinguishes all accessory obligations, such as those of sureties.

(a) Sed si eadem persona sit, a quo postea stipuleris; ita demum novatio sit, si quid in posteriore stipulatione novi sit; forte si conditio, aut dies, aut fidejussor adjiciatur aut detrahatur.

If the creditor wished to preserve the obligations of the other debtors and sureties, it would be necessary for him to make it a condition of the novation, that the co-debtors and sureties should accede to the new debt; in which case, in default of their acceding to it, there would be no novation, and the creditor would preserve his ancient claim.

From the principle that a novation extinguishes the ancient debt, it follows also, that it extinguishes the hypothecations which are accessory to it; *novatione legitimè facta liberantur hypothecæ. L. 18. ff. de Novat.*

But the creditor may, by the very act which contains the novation, transfer to the second debt the hypothecations which were attached to the first. *L. 12. § 5. ff. qui potior.*

For instance, if by an act of 1750, you borrowed from me a sum of 1000*l.* with an hypothecation of your estates, and by an act in 1760, you contracted a new obligation in my favour, and it is expressed in the act, that by force of the new obligation, you shall be discharged from that of 1750, *of which the parties intended to make a novation, reserving the hypothecations*, I shall by this clause retain my former rank and priority of hypothecation in support of my new demand. (a) *L. 3. L. 21. (b) ff. dict. tit.*

Observe, that if the new debt were larger than the first, I should only preserve my rank of hypothecation so far as the sum which was due to me by the act of 1750; for the transfer of the hypothecation to the new demand ought not to operate to the prejudice of intermediate creditors.

Observe also, that such transfer of the hypothecation can only be made with the consent of the person to whom the things hypothecated belong. In the above instance, it is evident that you have consented to this transfer, since you were a party to the act in which the reservation is contained. But if a third person, by an act of 1760, obliged himself to pay me the sum which you owed me by the act of 1750, and it is said, that by reason of these presents, the debt of 1750 shall be discharged, *reserving the hypothecations*, although the novation may be made without your

(a) Creditor, acceptis pignoribus, quæ secunda conventionione secundus creditor accepit, novatione postea facta, [pignora] prioribus addidit; superioris temporis ordinem manere primo creditori placuit, tanquam in suum locum succedenti.

(b) Titius Seius ob summam, quæ ex tutela ei condemnatus erat, obligavit pignori omnia bona sua, quæ habebat, quæque habiturus esset: postea mutuatus a Fisco pecuniam, pignori ei res suas omnes obligavit, & intulit Seio partem debiti, & reliquam summam, novatione facta, eidem promisit, in qua obligatione similiter, ut supra, de pignore convenit: quæsitum est, an Seius præferenda sit Fisco, & in illis rebus, quas Titius tempore prioris obligationis habuit, item in his rebus, quas post priorem obligationem adquisivit, donec universum debitum suum consequatur? Respondit, nihil proponi, cur non sit præferenda.

intervening, the hypothecation upon your estates attached to your debt of 1750, cannot be transferred to the new debt of 1760, unless you intervene and give your consent; as the new debtor, to whom the things hypothecated do not belong, cannot, without the assent of you to whom they do, hypothecate them for the new debt. This is decided by *Paulus* in the law 30. ff. de Novat. "*Paulus respondit, si creditor a Sempronio novandi animo stipulatus esset, ita ut a prima obligatione in universum discederetur, rursus easdem res a posteriore debitore sine consensu debitoris prioris obligari non posse.*"

According to the same principles, if one of several debtors in solido contracts a new obligation in favour of the creditor, and it is expressed in the act that the parties intend to make a novation of the first debt, reserving the hypothecations; such reservation can only affect the hypothecation of the goods of the debtor who contracts the new debt, and not those of his co-debtors, which cannot be hypothecated for the new debt without their consent.

Whatever reservation the creditor may make by the act which contains the novation, the sureties of the former debt cannot be obliged for the new, unless they consent to it.

ARTICLE VI.

Of Delegation.

§ I. *What a Delegation is, and how it is made.*

[564] Delegation is a kind of novation, by which the original debtor, in order to be liberated from his creditor, gives him a third person, who becomes obliged in his stead to the creditor, or to the person appointed by him.

Delegare est vice sua alium reum dare creditori, vel cui jusserit. L. 11. ff. de Novat.

It results from this definition, that a delegation is made by the concurrence of three parties, and that there may be a fourth.

There must be a concurrence, 1st, of the party delegating, that is, the ancient debtor who procures another debtor in his stead.

2d, Of the party delegated, who enters into an obligation, in the stead of the ancient debtor, either to the creditor or some other person appointed by him.

3d, Of the creditor, who, in consequence of the obligation contracted by the party delegated, discharges the party delegating.

Sometimes there intervenes a fourth party, viz. the person indicated by the creditor, and in whose favour the person delegated becomes obliged, upon the indication of the creditor, and by the order of the person delegating.

To

To produce a delegation, the intention of the creditor to discharge the first debtor, and to accept of the second in his stead, must be perfectly evident; therefore, if *Peter*, one of the heirs of my debtor, in order to liberate himself from an annuity to me, has, upon a partition of the succession, charged his co-heir *James* with the payment of it, *Peter* will not be liberated, unless I formally declare my intention, that he shall be so; and though I receive the annual payments from *James*, for a considerable time, it must not be concluded, that I have taken him as my sole debtor, in the place of *Peter*, and discharged *Peter*. *Arg. L. 40. (a) § 2. ff. de Pact.*

§ II. Of the Effect of a Delegation.

[565] A delegation includes a novation, by the extinction of the debt from the person delegating, and the obligation contracted in his stead by the person delegated. Commonly, indeed, there is a double novation; for the party delegated is commonly a debtor of the person delegating; and in order to be liberated from the obligation to him, contracts a new one with his creditor. In this case there is a novation both of the obligation of the person delegating, by his giving his creditor a new debtor, and of the person delegated, by the new obligation which he contracts. *Arg. l. 40. (b) § 2. ff. de Pact.*

[566] If the person delegated were not in truth the debtor of the party delegating him, although he would not have entered into the engagement, except upon the supposition of being such debtor, the obligation will not be the less binding, and he cannot resist the payment of it, saving his recourse against the person delegating him. The creditor who receives no more than is due from the original debtor, whom he has discharged, ought not to suffer by the mistake. *Si per ignorantiam promiserit, nulla quidem exceptione uti poterit adversus creditorem, quia ille suum recepit; sed is qui delegavit, tenetur condictione. L. 12 ff. de Novat.*

It would be otherwise, if the person to whom the substitute was obliged were not the creditor of the delegant, whether the delegant himself was in error upon the subject, and supposed him to be such, or whether he intended to make a donation. In either case, the substitute who contracts his obligation under a mistake, and upon the erroneous persuasion that he is indebted, will not be

(a) Tale pactum, *profiteor te non teneri*, non in personam dirigitur; sed, cum generale sit, locum inter heredes quoque litigantes habebit.

(b) Vide supra, n. 564.

obliged, and may resist the demand, the error being discovered. *L. 7. (a) ff. de Dol. Except. L. 2. (b) § 4. ff. de Donat.*

The reason of the difference is, that in this case the person to whom the substitute is obliged, *certat de lucro captando*; whereas the other, who has engaged by mistake, *certat de damno vitando*. And more favour is always due to him *qui certat de damno*, than to him *qui certat de lucro*. Therefore, he ought not to be only discharged from his obligation, contracted under a mistake, but even to have a repetition of what he has paid in consequence of it, according to the rule, *Melius est favere repetitioni, quam adventitio lucro*. In the preceding case, on the contrary, the creditor to whom the substitute is obliged, *versaretur in damno*, if the substitute was discharged from his obligation.

[567] If the substitute only obliges himself under a condition, the whole effect of the delegation will be in suspense, until the condition is accomplished, and as the obligation of the substitute depends upon the accomplishment of the condition, so likewise does the discharge of the delegant from his obligation, which can only become extinct by the new obligation contracted in its stead. And the obligation of the substitute to the delegant likewise depends upon the same condition; for the substitute can only be discharged from his obligation to the delegant, so far as he contracts in his stead an obligation to the creditor.

Although the substitute is not liberated as against the delegant, until the accomplishment of the condition, still the delegant, by whose order he has obliged himself upon such condition, cannot institute any suit against him, until the condition has failed; for as long as it may take effect, it is uncertain whether the substitute will be obliged to him, or to the new creditor. This is the decision of *L. 39. (c) ff. de Reb. Cred.*

§ III. *Whether the Delegant is answerable for the Insolvency of the Substitute?*

[568] Regularly where the person delegated contracts a valid obligation to the creditor, the delegant is entirely liberated, and the creditor has no recourse against him, in case of the substitute's insolvency. The creditor, by accepting the dele-

(a) Julianus ait, si pecuniam quam me tibi debere existimabam, jussu tuo sponderim, cui donare volebas; exceptione doli mali poterò me tueri; & præterea conditio mihi adversus stipulationem compevit, ut me liberet.

(b) Item si ei, quem creditorem tuum putabas, jussu tuo pecuniam, quam me tibi debere existimabam, promiserò; petentem doli mali exceptione summovebo; et amplius incerti agendo cum stipulatore, consequar, ut mihi acceptam stipulationem.

(c) Itaque tunc potestatem conditionis obtinet, cum in futurum confertur.

gation, must follow the condition of the substitute. *Nomen ejus secutus est.*

There is an exception to this principle, if it is agreed that the debtor shall at *his own risk* delegate another person. *Paulus* decides, that in this case the creditor may maintain an action against the delegant for any loss sustained by the insolvency; for when at the request of my former debtor, I take another person in his stead, and at his risk, it amounts to a contract of mandate. I become his mandatary by assenting to the delegation, and of course am intitled to an indemnity from what the execution of it may cost. Now this mandate costs me the sum which is not paid by the substitute; therefore, I ought to be indemnified from it.

But for this purpose, I must not have omitted using proper diligence to obtain a payment, whilst the substitute continued solvent; for otherwise, it is my own fault if I lose the money. And according to the rules of the contract of mandate, the mandatory has no claim to an indemnity, except for the expence which he has incurred, without any fault of his own. *Venit in actione mandati, quod mandatorio, ex causa mandati, abest inculpabiliter.*

As it is not the delegation itself, but the contract of mandate, which is supposed to intervene between the delegant and the creditor, which renders the delegant responsible for the insolvency of the substitute; it is for the creditor who would take advantage of this contract of mandate, to shew by writing, that it has intervened, and that he has only accepted the delegation at the risk of the delegant. Such an agreement is not presumed, as has been decided by an *arrêt*, reported by *Bouvet*.

Cujas ad L. 26. § 2. ff. Mand. ad Libr. 33. Paul. ad Edic. states another exception to our principle, which is, that although the delegation is not made with a condition that it shall be at the risk of the delegant, yet if the substitute, at the time of the delegation, was insolvent, and this circumstance was unknown to the creditor, the delegant should be bound. This decision is founded in equity. Delegation is a contract of mutual interest, in which each party intends to receive as much as he parts with. The equity of such agreements consists in their equality, and they are not equitable, when one of the parties parts with too much, and receives too little in return. According to these principles, your delegating to me a debt from an insolvent person, in lieu of a debt of the like amount from yourself, is manifestly unequal: for, by such a delegation, you receive an actual release of your debt, which release has a real and effective value of as much as the debt amounts to, and for that value you give me nothing in return, but a credit upon an insolvent debtor, the value of which is little or nothing. In order then to atone

atone for the injustice of such a contract, it is proper that you should bear the loss, arising from the insolvency of the debtor, whom I have by mistake accepted in your stead.

It would be otherwise, if, at the time of the delegation, I were apprised of the insolvency. The delegation in this case is not a contract of mutual interest, but a real benefit, voluntarily conferred upon you, and having a knowledge of the fact, I can have no reason to complain. *Volenti non fit injuria.*

Despeisses rejects this sentiment of *Cujas*, and contends, that unless it is expressly agreed that the delegation shall be at the risk of the delegant, *suo periculo*, the creditor can never object to the insolvency of the debtor, whom he has consented to receive by way of delegation, whatever ignorance he may allege. His reason is, that otherwise the delegation would never have the effect of liberating the delegant, which is the effect naturally incident to it, since the creditor might always pretend that he was ignorant of the insolvency of the person delegated.

These reasons appear sufficient for the rejection of *Cujas's* opinion, as a matter of law; which, however, appears indisputably right in point of conscience,

§ IV. *Difference between Delegation, Transfer, and Simple Indication.*

[569] It remains to observe, that delegation is something different both from transfer and simple indication.

The transfer which a creditor makes of his debt does not include any novation. It is the original debt which passes from one of the parties, who makes the transfer, to the other who receives it; and the person having the transfer is, properly speaking, only the procurator *in rem suam* of the creditor. Besides, the transfer only takes place between these two persons, without the consent of the debtor necessarily intervening.

For the nature of a transfer, see *Pothier's Treatise on Sales*, Part VI. ch. 3.

A delegation also differs from a simple indication.

When I indicate to my creditor a person from whom he may receive payment of the money which I owe him, and to whom I give him an order for the purpose, it is merely a mandate, and neither a transfer nor novation. I remain the debtor, and the person designated by the order does not become such in my stead.

So where the creditor indicates a person to whom his debtor may pay the money, this indication does not include any novation; the debtor does not contract any obligation to the person indicated, but continues the debtor of his creditor who made the indication.

As to this kind of indication, see *supra*, Ch. 1. Art. II. § 4.

C H A P. III.

Of the Release of a Debt.

[570] The release which the creditor makes of the debt, is also one of the modes in which obligations are extinguished, for it liberates the debtor *pleno jure*.

A R T I C L E I.

In what Manner the Release of a Debt is made (a).§ I. *Whether the Release of a Debt may be made by a mere Agreement?*

[571] According to the principles of the *Roman* law, there was a difference between civil obligations resulting from consensual contracts, which were contracted by the mere consent of the parties, and other civil obligations, which resulted from real contracts (b), or from stipulations. With respect to those contracted by the consent of the parties, the release might be made by a simple agreement, by which the creditor agreed with the debtor to hold him acquitted, and such agreement extinguished the obligation *pleno jure*. L. 35 (c). *ff. de R. I.* With respect to other

(a) In *England*, a release can only be by deed sealed and delivered.

If several persons are jointly and severally bound in a contract, a release to one operates as a discharge to all.

If there is a covenant never to sue a sole debtor, or all the debtors, who are jointly bound, this has the effect of a release; but a covenant not to sue for a particular time, is no bar to an action, though it is a valid contract, and an action may be maintained for damages on the breach of it. Also, a covenant never to sue *one* of several debtors, is no defence either to the person with whom it is made, or the others: *Dean v. Newball*, 8 T. R. 168. The reason of these distinctions is to be found in certain ulterior principles, and the distinctions themselves are by no means arbitrary. When a creditor covenants never to sue his debtor, the sum which the debtor is afterwards compelled to pay would be the measure of damages for an infraction of that covenant, and consequently, to admit a right of action, would be a mere circuity. When the covenant is not to sue for a limited time, if that would stop the right of action, a legal maxim, that a personal action once suspended by the act of the parties is absolutely extinct, would attach and defeat the right of suit, not only during the limited time, but ever afterwards, contrary to the true intention. And the objection of circuity cannot apply when there are several debtors, and the covenant only extends to one. It is not to be presumed, that the intention of the person covenanting was to produce a collateral effect with respect to others, when a distinct and reasonable effect may be produced, by giving the party, claiming the benefit of the covenant, redress for any injury which he may personally sustain from the infraction of it. See Appendix, N^o XI.

(b) Real contracts were those which required the interposition of a thing (*rei*), as the subject of them; for instance, the loan of goods to be *specifically* returned.

(c) *Nihil tam naturale est, quam eo genere quidque dissolvere, quo colligatum est: ideo verborum obligatio verbis tollitur; nudi consensus obligatio contrariio consensu dissolvitur.*

civil

civil obligations: for the release to extinguish the obligation *pleno jure*, it was necessary to have recourse to the formality of an acceptilation (a), either simple, if the obligation resulted from a stipulation, or *Aquilian*, if from a real contract; *v. tit. de Accept. in Inst. & Pand.* A simple agreement by the creditor to acquit the debtor, did not extinguish such obligations *pleno jure*; but only gave the debtor an exception, or *fin de non recevoir*, against the action of the creditor, demanding the payment of the debt, contrary to the faith of the agreement.

This distinction and these subtleties are not admitted in the law of *France*, in which we have no such form as an acceptilation; and all debts, of whatever kind, and in whatever manner contracted, are extinguished, *pleno jure*, by a simple agreement of release between the creditor and debtor, provided the creditor is capable of disposing of his property, and the debtor is not a person to whom the creditor is prohibited by law from making a donation.

Therefore all that is said in the title, *ff. de Accept.* concerning the form of an acceptilation, and particularly that acceptilation cannot be made under a condition. *L. 4. ff. de Acceptil.* has no application in the law of *France*.

With us there is nothing to prevent the creditor making the release of the debt depend upon a condition, and the effect of such a release is to render the debt conditional, the same as if it had been contracted under the opposite condition to that of the release.

§ II. *In what Case is a tacit Release presumed?*

[572] A release of a debt may be made, not only by an express agreement, but also by a tacit agreement, resulting from facts that induce a presumption to that effect. Thus, if a creditor has restored to his debtor the writing containing the obligation, he is presumed to have released the debt. *Si debitori meo reddiderim cautionem, videtur inter nos convenisse ne peterem. L. 2. § 1. ff. de Pact.*

If the writing were subscribed by several debtors in solido, and the creditor had restored it to one of them, some doctors cited by *Bruneman*, *ad L. 2. ff. de Pact.* have held that the restoration of the writing ought only to be presumed a personal discharge of the

(a) Acceptilation may be regarded in a great degree as the converse of stipulation, being a certain formality, by which the debtor asked the creditor, whether he had received what the other had promised? to which he answered, that he had; and this was held to operate as a release, without actual payment. But as this simple mode of acceptilation only discharged obligations contracted verbally, the *Aquilian* stipulation was introduced, which consisted of a mutual interrogation, whereby the original obligation was first converted into a verbal obligation, and afterwards discharged by acceptilation.

debt to the debtor, to whom the writing is given up. It appears to me on the contrary, that it ought to be presumed, that the creditor intended to release and entirely extinguish the debt; for if he only intended to discharge one of the debtors, he would have retained the writing, which would be necessary to enforce payment from the others.

[573] Upon the question, whether the possession of the writing by the debtor, is in itself a sufficient ground for the presumption that it was delivered up by the creditor, *Boiceau*, following some ancient doctors, makes a distinction; he says, that if the debtor alleges that he has paid the debt, his possession of the writing is a sufficient ground for the presumption, and that the writing should be deemed to have been restored upon the acquittal of the debt, unless the creditor proves the contrary; but that if he alleges that the creditor has released him from the debt, the possession is not sufficient, and he ought to prove that the creditor had voluntarily released the debt, and given up the writing; for a release is a donation, and a donation ought not to be presumed; *nemo donare facile presumitur*; and besides it is an agreement which, according to the ordonnance, ought to be established by writing. I think this not a solid distinction, and that it ought to be decided generally from the possession of the debtor, that the creditor shall be presumed to have given up the security, either as acquitted or released, until the creditor shews the contrary. As for instance, that it has been taken surreptitiously. It is to no purpose to say that a donation is not to be presumed, for that only means that it is not to be presumed easily and without sufficient ground: now, according to the law cited, there is a sufficient ground to presume a donation and release of the debt, when the creditor gives up the security, and the circumstance of the security being in the possession of the debtor, is a sufficient reason for presuming that the creditor has given it up; as that is the most natural way of the possession passing from the one to the other.

The argument derived from the ordonnance which declares that agreements, whose object exceeds 100 livres, shall be proved by writing, is not better than the other; the intention of the ordonnance was only to exclude parol proof, and not the presumptions resulting from acts avowed by the parties.

A distinction adduced by *Boiceau*, founded upon the relative situation of the debtor, is more plausible. If the debtor were the general agent, or clerk of the creditor, having access to his papers, the possession alone might not be a sufficient presumption either of a payment or release. So if he was a neighbour, into whose house

house the effects of the creditor had been removed on account of a fire.

[574] The restitution of an article pledged does not induce a presumption either of the release or payment of the debt. *L. 3. (a) ff. de Pact.* for the creditor might have no further intention than to remit the pledge, and not to release the debt.

[575] A creditor is presumed to have released the solidity to debtors in solido, when he has admitted them to pay singly. *V. supra, n. 277. & seq.*

[576] When there is a contract between you and me, involving mutual obligations, and before it is executed on either side there is a new agreement, by which I liberate you from your engagement, you are likewise presumed to have discharged me from the reciprocal obligation. Thus, if I sell you an estate, and we afterwards agree that I shall discharge you from the purchase, you will be deemed to have also discharged me from the sale. *L. 23. (b) ff. de Accept.*

[577] The omitting to except one debt in the release which is given for another, forms no presumption of a release of that which is not mentioned. *L. 29. (c) ff. de Oblig. & Act.*

So if there is a statement of mutual accounts, and one of the parties omits including a demand which he has upon the other, it is no presumption of that demand being released, it will be rather considered as an accidental omission, which will not deprive the creditor of his right of recovering the debt, notwithstanding its not being comprized in the account.

But such a presumption may arise where three circumstances concur. 1st, When the debtor and creditor are nearly related, or a great friendship subsists between them. 2d, Where not only one but several accounts have passed without any notice of the demand. 3d, When the creditor has died, not having made any claim. Upon such a concurrence *Papinian* directs that a release shall be presumed. This is the decision of the famous law, *Procula, 26. (d) ff. de Probat.*

§ III. Whether

(a) Postquam pignus vero debitori reddatur, si pecunia soluta non fuerit, debitum peti posse dubium non est, nisi specialiter contrarium actum esse probetur.

(b) Si ego tibi acceptum feci, nihilo magis ego à te liberatus sum : Paulus, imo, cum locatio, conductio, emptio, venditio, conventionem facta est, et nondum res intercessit, utrinque per acceptilationem, tametsi ab alterutrâ parte duntaxat intercessit, liberantur obligatione.

(c) Lucio Titio cum ex causa judicati pecunia deberetur, et eidem debitori aliam pecuniam crederet, in cautione pecuniæ creditæ non adjecit sibi præter eam pecuniam debitam sibi ex causa judicati : Quæro, an integræ sint utæque Lucio Titio petitiones ? Paulus respondit, nihil proponi cur non sint integræ.

(d) Procula magnæ quantitatis fideicommissum a fratre sibi debitum, post mortem ejus

§ III. *Whether a Release may be made by the mere Will of the Creditor, without an Agreement.*

[578] We have seen that a valid release may be made, either by an express or tacit agreement between the creditor and the debtor. Some authors are of opinion, that it may be made by the mere will of the creditor, declaring that he makes a release, provided he be capable of disposing of his effects. This is the opinion of *Barbeyrac*, in his notes upon *Puffendorf*: his reason is, that every person, who has the disposal of his effects, may at his pleasure renounce the rights which belong to him, and that by renouncing he loses them. *Paulus* in the law 2. (a) § 1. ff. *pro Derel.* expressly decides, that we may by our will alone renounce, and lose the rights of dominion of a corporeal thing which belongs to us; for the same reason, we may renounce the right of credit which we have against our debtor: and, as there can be no debt, without a right of credit in the person in whose favour it was contracted, the renunciation, and abandonment which the creditor makes of his right of credit, necessarily induces the extinction of the debt. According to these principles, if a creditor at *Orleans* has written a letter to his debtor at *Marseilles*, by which he intimates a release of his debt; although the debtor dies after the letter was written, but before it came to hand, so that no agreement can be said to have intervened between him and the creditor, nevertheless, according to the principles of *Barbeyrac*, it must be decided that the debt is extinct, and that the creditor, who by the letter has declared his intention of renouncing his demand, cannot enforce it against the heirs of the debtor.

I do not think that this opinion of *Barbeyrac* could be followed in practice: I readily agree with him, that (supposing a metaphysical case) a creditor, who had an absolute intention of abdicating his right, may by his will alone extinguish it; but where a creditor declares that he makes a release to his debtor of his debt, he should not be presumed to have this absolute intention of abdicating his demand, but rather that of making a gift of it to his debtor. Now, as every gift requires the acceptance of the donatary, it should be held that the creditor only intended to abdicate his right of credit,

in ratione cum heredibus compensare vellet, ex diverso autem allegaretur, nunquam id a fratre quamdiu vixit, desideratum, cum variis ex causis sæpe [in] rationem fratris pecunias ratio *Proculus* solvisset; Divus Commodus, cum super eo negotio cognosceret, non admisit compensationem, quasi tacite fratri fideicommissum fuisset remissum.

(a) Sed *Proculus*, non desinere eam rem domini esse, nisi ab alio possessa fuerit: *Julianus*, desinere quidem omittentis esse, non fieri autem alterius, nisi possessa fuerit; et recte.

upon his release and gift receiving their perfection by the acceptance of the debtor; therefore, in the case supposed, I think it ought to be decided contrary to the opinion of *Barbeyrac*, that the release of a debt, communicated by letter, ought not to have any effect, if the debtor to whom it was made happens to die before the letter arrives.

Even if the principle of *Barbeyrac* were to be followed, it could only be when the release was pure and simple: when it was made under certain conditions, it is evident that it could have no effect, before the debtor had accepted the conditions.

§ IV. *Whether a Release may be made in part.*

[579] A release of a debt may be made either wholly or in part: the *Roman* laws excepted, with regard to an acceptilation, the case where the thing was not susceptible of parts. For instance, if I were obliged in your favour to impose a certain right of servitude upon my estate for the advantage of yours, the acceptilation of this debt could not be made by parts, *L. 13. § 1. (a) ff. de Acceptil.*; but with us, there is nothing to prevent such a debt being released in part, as for a half, a third, &c. and the effect of this release will be, that you can only demand from me the right of servitude, upon giving me the half or third, &c. of the value.

A R T I C L E II.

Of the different Kinds of Releases.

We may distinguish two different kinds of releases, the one we call a real release, the other a personal discharge.

§ I. *Of a real Release.*

[580] A real release is where the creditor declares that he considers the debt as acquitted; or when he gives a discharge, as if he had received the payment of it, although he has not.

Such a release is equivalent to a payment, and renders the thing no longer due; consequently it liberates all the debtors of it, as there can be no debtors, without something due.

(a) Si id, quod in stipulationem deductum est, divisionem non recipiat, acceptilatio in partem nullius erit momenti; ut puta, si servitus fuit prædii rustici vel urbani. Plane si ususfructus sit in stipulatum deductus, puta fundi Titiani, poterit pro parte acceptilatio fieri, et erit residue partis fundi ususfructus. Si tamen ~~viam~~ quis stipulatus, accepto iter vel actum fecerit, acceptilatio nullius erit momenti: hoc idem est probandum, si actus accepto fuerit latus; si autem iter et actus accepto fuerit latus, consequens erit dicere liberatum eum qui viam promisit.

§ II. Of a personal Discharge.

[581] A personal release or discharge is that, by which the creditor merely discharges the debtor from his obligation; such discharge *magis eximit personam debitoris q̄ obligatione, quam extinguit obligationem*: it only extinguishes the debt indirectly, where the debtor, to whom it is granted, was the sole principal debtor, because there can be no debt without a debtor.

But if there are two or more debtors in solido, a discharge to one of them does not extinguish the debt; it only liberates the person to whom it is given, and not his co-debtor: the debt is extinguished, however, as to the part of the person to whom the discharge was given, and the other only remains obliged for the remainder. The reason is, that if each is debtor for the whole, it is only on condition that the creditor shall cede to him his rights and actions against the other. The creditor having by his own act rendered himself incapable to cede them, against the debtor whom he has discharged, the other ought not to suffer by it, as we have seen, *supra*, n. 250.

A discharge to a principal debtor induces that of his sureties: for it would be useless to discharge him, if his sureties were not discharged likewise, since the sureties, if they were obliged to pay, would have recourse against him; besides, there can be no sureties without a principal debtor. This rule, however is subject to an exception with respect to contracts, *d'attermoient*, *supra*, n. 380.

Contra, vice versa, a discharge to a surety does not discharge the principal debtor, for the obligation of the surety depends upon that of the principal, but the obligation of the principal does not depend upon that of the surety: there cannot be a surety without a principal debtor, but there may be a principal without a surety.

A personal discharge to one surety does not discharge his co-sureties, L. 23. (a) *ff. de Pact. L. 15.* (b) § 1. *ff. de Fidej.* Nevertheless, if the co-sureties were entitled to compute upon having recourse against the one who is discharged, having contracted their engagements at the same time with him, or after him, it is equitable that a discharge granted to him should liberate them, in re-

(a) Fidejussoris autem conventio nihil proderit reo, quia nihil ejus interest a debitore pecuniam non peti; immo, nec confidejussoribus proderit, neque enim, quomodo cujusque interest. Cum alio conventio facta prodest, sed tunc demum, cum per eum, cui exceptio datur, principaliter ei, qui pactus est, proficiat: sicut in reo promittendi, et his, qui pro eo obligati sunt.

(b) Si ex duobus, qui apud te fidejusserant in viginti, alter, ne ab eo peteres, quinque tibi dederit vel promiserit, nec alter liberabitur: et, si ab altero quindecim petere institueris, nulla exceptione summo-veris: reliqua autem quinque, si a priore fidejussore petere institueris, doli mali exceptione summo-veris.

spect of the part for which, after payment of the debt, they would have had recourse against him, if he had not been discharged. As the creditor was not entitled, by discharging such surety and depriving them of their recourse to prejudice them, they may with respect to this part oppose the *actio cedendarum actionum*, as we have seen; *n.* 250.

This decision, that a discharge granted to a surety neither liberates the principal debtor nor the co-sureties, holds good even where the creditor has received a sum of money from the surety to discharge him from his engagement; the principal will not on that account be at all discharged; for such sum is not given by the surety in payment, and to be applied in deduction of the debt, but as a price for the discharge of his engagement.

§ III. *Whether a Creditor may lawfully receive a Consideration for discharging a Surety, without applying it in Reduction of the Debt; and several Questions depending thereon.*

[582] What we have just said leads to the celebrated question, whether after a person has become surety for my debtor, to whom I have lent a sum of money, I may not only in point of law, but also in point of conscience, receive something from the surety, to discharge him from his engagement, and afterwards exact payment of the whole from the principal, without applying any part of what I have received from the surety in reduction of the debt? *Dumoulin*, in his *Treatise de Usur.* 2. 34. decides, that it may be lawfully done, if, at the time of discharging the surety, there was reason to apprehend the insolvency of the principal debtor. I am not thereby guilty of usury; for usury consists in receiving something beyond the sum lent, as a price and recompence for the loan; it consists in receiving a reward for a service which ought to be gratuitous. This is received on a totally different account. The risk of the debtor's insolvency, which was the subject of apprehension, was the risk of the surety and not of myself. I may take this risk upon myself and discharge the surety, and am under no obligation of doing so for nothing. This risk is appreciable, and I may fairly receive a sum of money for the price of it.

Thus, supposing me to be a creditor of *Peter* for 1200*l.*, and you to be his surety. The affairs of *Peter* become deranged, and there is reason to apprehend that there may be a loss of half the debt, or more. This risk would fall upon you. You offer me 300*l.* for taking it upon myself, and giving you a discharge, which offer I accept; afterwards, *Peter's* affairs come round, and he pays the whole debt, by which I am a gainer of the 300*l.* received from you.

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This gain is perfectly fair, it is the price of the risk, which I have undertaken in your stead, of losing 600*l.* or more. Neither the principal debtor nor you have any reason to complain. The principal cannot, for he has no interest in the matter; he pays what he owes, and nothing more; you cannot complain, for if you have given me 300*l.* more than was due to me, I have given you an equivalent by taking the risk upon myself. It is a contract of hazard between us, and is as equitable as a marine insurance. It may perhaps be objected in the case of a loan, that the risk of the borrower's insolvency cannot entitle the lender to any extra compensation: I answer that this principle is only true as it affects the debtor; the risk which a creditor runs of losing the sum which he has lent, through insolvency, cannot give him any right to demand any thing beyond this sum from the debtor, as on his part it would be a pure loss, and he would receive nothing in return; besides, his poverty ought to be a reason for relieving rather than oppressing him; but the risk of the debtor's insolvency may give the creditor a right to receive something from a third person who was subject to that risk, as a consideration for taking it upon himself, for the third person, by having a discharge, receives something in return.

When there is no reason to doubt the solvency of the principal, *Dumoulin, ibid.* decides, that the creditor cannot lawfully take any thing from the surety to liberate him from his engagement. It may be opposed, that the right which I had against the surety was a right *in bonis*, which was part of my property; I give him up this right by a release, and there is no reason why I should not receive something in lieu of what I part with; I answer, that according to the rules of commutative justice, I cannot demand more in lieu of any thing which I part with, than an equivalent for that thing, that is to say, what it may be appreciated at; and if it cannot be appreciated at any thing, nothing can be demanded for it. Now, such is the right which I have against the surety, and which is the subject of the release. Thus, suppose *Peter* owes me a hundred pounds, and there is no suspicion of his solvency, I have securities upon property of considerably greater value; you are his surety, and I release you from your engagement; what value can be placed upon the right resulting from such an engagement? My debt, with all the rights connected with it, is worth a hundred pounds, and no more, without the addition of your engagement; it is worth that sum, because it is supposed to be fully secured; consequently the right which I release cannot be valued at any thing. By remitting it I suffer no loss, and therefore I cannot fairly receive any thing by way of remuneration.

Observe, that where a surety gives something to a creditor for his discharge, it ought to be presumed in point of law, that there was some apprehension of insolvency, for a person is not presumed to throw away his property without any prospect of advantage. *Nemo res suas jactare facile præsuntur.*

Even if it should be fully proved, that, at the time of the surety paying a consideration for his discharge, there was no real ground for apprehending the insolvency of the debtor, the surety, so long as the debt in fact continues unpaid, has no right of repetition, except upon an offer to renew his former obligations. *Dumoulin, ibid.*

The surety may in this case offer to pay the debt, deducting what he has already paid for his discharge; and if he were surety of an annuity, the payment should be first applied to the arrears which are due, and then to the principal: and upon paying, he may demand to be subrogated to the rights of the creditor; for although he was discharged, he ought not to be regarded as an entire stranger, as he makes the payment in order to obtain what he has already given to be so. *Dumoulin, ibid.*

With respect to the principal debtor, he can never have any right of repetition against the creditor, for what has been unduly received in order to liberate the surety, nor any right to make a deduction on that account when he pays; for, the surety not having any recourse against the principal for what he has paid upon such a consideration, the principal has no interest in the subject.

But if the surety has recourse against the principal for what he has paid, in discharge of the engagement; as, if the principal was bound to the surety to pay the debt in a limited time, and it was agreed that after the principal was put *en demeure*, the surety might purchase his own discharge from the creditor upon the best terms he could, for which the principal should indemnify him; in this case the principal might retain this sum in making his payment; for, as the surety will have recourse for it against him, it is the same as if he had paid the money himself. *Dumoulin, ibid.*

A R T I C L E III.

What Persons may make a Release, and to whom.

§ I. *What Persons may make a Release.*

[583] It is only the creditor when he has the power to dispose of his property, or a person having a special authority from him, who can release a debt.

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A person having a general procuration, a tutor, a curator, an administrator, have not this right, *L. 37. (a) ff. de Pact. L. 22. (b) ff. de Adm. Tut.* for all these persons have only the power of administering and not of giving; now, a release is a donation.

A release of part of a debt given to a debtor, in case of failure, must be excepted, as it is not made so much *animo donandi*, as with an intention to insure, by that means, the payment of the remainder of the debt, instead of losing the whole; such release may be deemed an act of administration of which these persons are capable.

Releases of a part of the seignoral profits, due on the alienation of an estate, made to a person who wishes to compound for such profits, previous to his concluding his bargain for the purchase, are also acts of administration, to which tutors and other administrators are competent: for, in this case, such releases are rather compositions than donations; they are not made so much *animo donandi*, as to avoid losing the profits due upon the alienation by the bargain going off.

Tutors, and other administrators, may make a release of a part of the profits, even after the conclusion of the sale, and in the case of necessary exchanges, provided such release be not excessive, and are conformable to those which the lords are accustomed to make; for though it cannot be disputed but that such releases are real donations, *liberalitas nullo jure cogente facta*, yet usage has rendered them not indeed an obligation but a matter of propriety; now, donations of this kind are not forbidden to tutors and other administrators. *Arg. L. 12. (c) § 3. ff. de Adm. Tut.*

Where there are several creditors *in solido, correi credendi*, one of them may, without the others, make a release of the debt, and such release discharges the debtor from all the others, the same as a real payment. *L. 13. (d) § 12. ff. de Accept.*

§ II. To whom the Release may be made.

[584] It is evident that the release of a debt can only be made to the debtor; but, it is presumed to be made to

(a) Imperatores Antoninus et Verus rescripserunt, debitori reipublicæ a curatore permitti pecunias non posse, et cum Philippensibus remissæ essent, revocandas.

(b) Vide *supra*, n. 555.

(c) Cum tutor non rebus duntaxat, sed etiam moribus pupilli præponatur: in primis merces præceptoribus, non quas minimas poterit, sed pro facultate patrimonii, pro dignitate natalium constituet; alimenta servis, libertisque, nonnunquam etiam exteris, si hoc pupillo expediet, præstabit; solennia munera parentibus cognatisque mittet. Sed non dabit dotem sorori alio patre natæ, etiamsi aliter ea nubere non potuit; nam etsi honeste, ex liberalitate tamen sit, quæ servanda arbitrio pupilli est.

(d) Ex pluribus reis stipulandi si unus acceptum fecerit, liberatio contingit in solidum.

the debtor, whether the agreement which contains it is with the very person of the debtor, or with his tutor, curator, or other administrators.

As parents, by the ordonnance of 1731, *art.* 7. have a quality to accept donations made to their minor children, though not under their tutelage, they may consequently accept any release from the creditors of their children.

[585] When there are several debtors in solido, the creditor may by a release to one of them extinguish the debt, and liberate all the others. *L.* 16. (a) *ff. de tit.* But it must appear that the creditor intended to extinguish the debt, for if his intention was only to discharge the person of the debtor, his co-debtors are not liberated, except for the part of him who is discharged, as was seen in the preceding paragraph.

[586] A release being a donation, it is requisite to its validity, that the debtor to whom it is made be not a person to whom the laws forbid a donation to be made : a release by a wife to her husband, of what he owed her, or by a sick person to his physician, would not be valid.

This ought not to extend to releases made rather by composition than by donation, such as those made in cases of failure, and compositions for seignoral profits.

Although the release of part of a seignoral profit, to a person to whom a donation could not legally be made, were not made by way of composition, but through liberality, as in the case of a necessary exchange, it ought to be valid, and ought not to be regarded as a prohibited donation, if it do not exceed what the lord is in the habit of making to strangers, as if it is only the release of a fourth part.

C H A P. IV.

Of Compensation (set off). (b)

[587] Compensation is the extinction of debts of which two persons are reciprocally debtors, by the credits of which they are reciprocally creditors, *compensatio est debiti et crediti inter se contributio.* *L.* 1. *ff. de Compens.*

For instance, if I owe you the sum of 50*l.* upon a loan ; and on the other hand, I am your creditor of the same sum for the rent of

(a) Si ex pluribus obligatis uni accepto feratur, non ipse solus liberatur, sed et hi qui secum obligantur, nam cum ex duobus pluribusque ejusdem obligationis participibus uni accepto fertur, cæteri quoque liberantur : non quoniam ipsis accepto latum est, sed quoniam velut solvisse videtur is, qui acceptilatione solutus est.

(b) *Vide Appendix, No. XIII.*

a house, which has accrued since the loan, my debt to you will be extinguished by way of compensation, by the credit of a like sum against you; and *vice versa* your debt to me, will be extinguished by your credit against me.

The equity of compensation is evident; it is established upon the common interest of the parties between whom it is made; it is clear that each of them has an interest to compensate, rather than to pay what they owe, and to have an action to recover what is due to them. This reason is adduced by *Pomponius*, in the law 3. ff. de *Compens.* *Ideo compensatio necessaria est, quia interest nostra potius non solvere quam solutum repetere.* He adds, that compensation avoids a useless circuitry, *quod potest brevius per unum actum expediri compensando incassum protraheretur per plures solutiones et repetitiones.*

We shall see with respect to this subject, 1st, Against what debts compensation may be opposed; 2d, What debts may be opposed in compensation; 3d, In what manner compensation is made, and what are its effects.

§ I. Against what Debts Compensation may be opposed.

[588] Regularly, compensation may be opposed against the debts of every thing susceptible of it.

The debts of things susceptible of compensation are, debts of a certain sum of money, of a certain quantity of corn, wine, and other consumable things.

The debt of an indeterminate thing of a specific kind, though not consumable, is likewise susceptible of compensation. For instance, if, by a contract of sale, you oblige yourself to give me a horse indeterminate, without saying what horse; this is a debt susceptible of compensation; and if, before it is paid, I become sole heir to a person who has left you a horse indeterminate, and in this quality am your debtor of a horse; it is evident that you may oppose by way of compensation the debt of the horse, due from me by the will against that due from you by the agreement.

On the contrary, where a thing, although in its nature consumable, is due as a specific and determinate object, the debt is not susceptible of compensation. For instance, if I have bought from you six pieces of wine, of this year's vintage, of your vineyard of *St. Denis*; and on the other hand, before you deliver them to me, I become sole heir of a person, who has by his will bequeathed to you six pieces of wine, and in this quality am your debtor of six pieces of wine; you cannot oppose against the debt to me of six pieces of your wine, that of the six pieces of which I am your debtor, and I

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may require you, without any regard to the compensation, to deliver me the six pieces of wine from your cellar, upon offering to give you six other pieces of good wine. The reason is, that compensation being a reciprocal payment between two parties, a creditor cannot be obliged to receive in compensation any other thing than what he would be obliged to receive in payment; now, according to the rule, *aliud pro alio invito creditori solvi non potest, supra, n. 494.* the creditor of a specific and determinate thing cannot be obliged to receive any other thing in payment, than that specific and determinate thing which is due to him; and it would not be competent to offer in payment any other thing, although of the same kind; and for the same reason, he cannot be obliged to accept any other thing in compensation. The debt of a specific and determinate thing, although of a consumable nature, is therefore not susceptible of compensation.

There is, however, one case in which the debt of a specific determinate thing may be susceptible of a compensation; for if I were your creditor of an undivided part of a specific thing, as if you had sold me an undivided part of an estate, and, before you delivered it to me, I became heir of a person who was your debtor of another undivided part of the same estate, you may oppose against the debt to me, of a part of this estate, the compensation of another part, which is due from me to you. *Sebast. de Medicis, Tract. de Compens. P. 1. § 3.*

[589] Where the thing due is susceptible of compensation, such a compensation may be opposed from whatever cause the debt proceeds.

It may even be opposed against the debt of a sum due by virtue of a judicial condemnation. *L. 2. (a) Cod. de Compens.*

There are, however, some debts, against which the debtor cannot propose a compensation.

1st, In the case of spoliation, no compensation can be opposed against the demand for the restitution of the things of which any person has been plundered, according to the well-known maxim, *spoliatus ante omnia restituendus, V. Sebast. de Medicis, Tract. de Compens. P. 2. § 28.*

2d, A depositary is not admitted to oppose any compensation against a demand for the restitution of the deposit, *in causa depositi compensationi locus non est. Paulus Sent. 11, 12, 13.*

This text of *Paulus* should be understood chiefly of an irregular

(a) Ex causa quidem iudicati [si debitum] solum repeti non potest, ea propter nec compensatio ejus admitti potest. Eum vero, qui iudicati convenitur, compensationem pecunie sibi debitæ implorare posse, nemini dubium est.

deposit, such as is spoken of in the laws 24 (a). 25 (b), § 1. and 26. (c) § 1. *ff. Depositum*, by which a sum of money is entrusted, to be mixed with other sums deposited by other persons, and to be restored, not in specie, but in amount. If it were an ordinary deposit, such as a bag of money sealed, compensation would not be allowed, not only because it is a deposit, but upon the general rule, that specific things are not susceptible of compensation.

The depositary cannot, indeed, oppose to the restitution of the deposit a compensation of the credits which he has against the person who entrusted him with it, when these credits arise upon other accounts: but when the credit arises from the deposit itself, as, for the expences which he has been obliged to incur for the preservation of it, there is a right of compensation, not only in the case of an irregular deposit, but also with respect to the deposit of a specific thing, which may be retained, *quasi quodam jure pignoris*, until the credit is discharged. This is the common decision of the doctors, cited by *Sebast. de Med. Tr. de Compens. P. 1. § 19.*

It is upon this principle that the receivers of consignations retain out of the sums consigned the fees belonging to their offices.

3d, The debt of a sum of money given, or bequeathed to me for my sustenance, and with a provision that it shall not be seized by my creditors, is a debt against which no compensation can be opposed. For as this clause prevents its being seized by other persons,

(a) *Centum nummos, quos hoc die commendasti mihi, adnumerante seruo Stichio aëtere, esse apud me ut notum haberes, hac epistola, manu mea scripta, tibi notum facio; quæ quando voles, & ubi voles, confestim tibi numerabo. Queritur, propter usurarum incrementum? Respondi, depositi actionem locum habere: quid est enim aliud commendare, quam deponere? Quod ita verum est, si id actum est, ut corpora nummorum eadem redderentur: nam si, ut tantundem solveretur, convenit, egreditur ea res depositi notissimos terminos. In qua quæstione, si depositi actio non teneat, cum convenit tantundem, non idem reddi, rationem usurarum haberi, non facile dicendum est. Et est quidem constitutum, id bonæ fidei judiciis, quod ad usuras attinet, ut tantundem possit officium arbitri, quantum stipulatio: sed contra bonam fidem & depositi naturam est, usuras ab eo desiderare temporis ante moram, quia beneficium in suscipienda pecunia dedit: si tamen ab initio de usuris præstandis convenit, lex contractus servabitur.*

(b) Qui pecuniam apud se non obsignatum, ut tantundem redderet, depositam, ad usus proprios convertit; post moram in usuras quoque deposito condemnandus est.

(c) *Lucius Titius ita cavit: Εἰλαβον, καὶ ἔχω εἰς λογον παρακαταθήκης τὰ προγεγραμμένα τῷ ἀργυρίῳ δηνάρια μυρία, καὶ πάντα ποιήσω, καὶ συμφωνῶ, καὶ ὁμολόγηται, ὡς προγεγραπται, καὶ συνειθέμεν χορηγῆσαι σοι τοκον ἰκάτης, μῶας ἰκάτω μηνος ὁλόλης τισσαρας, μεχρι τῆς ἀποδόσεως παντος τῷ ἀργυρίῳ, id est: Suscepi habeoque apud me titulo depositi superscripta denarium argenti decem millia; meque ad præscriptum omnia præstaturum & promitto, & profiteor; conventionem scilicet inita, ut quod omne argentum reddatur, in singulas menses, singulasque libras usurarum nomine, quaternos tibi obolos subministrarem. Quæro, an usuræ peti possunt? Paulus respondit eum contractum, de quo queritur, depositæ pecuniæ modum excedere: [&] ideo secundum conventionem usuræ quoque actione depositi peti possunt.*

and as it cannot be employed in discharge of what I owe to them, it also prevents its being employed in payment of what I owe to the person who was debtor of it. *Sebastian de Medicis, Tract. de Comp. P. 1. § 14.* gives another reason for this decision; that as provisions are necessary to existence, it would be a kind of homicide committed by the person who is charged to furnish them, if he refuses to do so under any pretext whatever, even of compensation, *necare videtur, qui alimonia denegat. L. 4. ff. de Agnos. Liber.*

4th, A feudal tenant cannot oppose the compensation of a sum due to him from the lord against his obligation to go or send to pay him the rent-service due at the accustomed day and place. The reason is, that this includes the debt, not only of a sum of money, but of the recognition of an immediate seignory, which is not susceptible of valuation, nor consequently of compensation.

This duty is not susceptible of compensation even against a debt of a like nature. Thus, if I owe you a rent service of three-pence payable at your Manor Hall, on *St. Martin's* day, for an estate situate in your seignory, under penalty of five shillings; you owe me a like sum, payable the same day, for an estate situate in mine, under a penalty of only three shillings: no compensation can take place. The reason is, that compensation, when it takes place, should give each party what belongs to him. If I owe you five hundred pounds, and you owe me the same, a compensation, by procuring me a discharge, gives me in effect the five hundred pounds which were due from you; for the liberation from the five hundred pounds, which I owed you, is really worth five hundred pounds; but in the case proposed, the discharge from recognizing your seignory of the estate which I hold of you, cannot give me a recognition for that which you hold of me; therefore, in this case, compensation cannot be admitted, since it cannot give to each of us what belongs to us: besides, *monumenta censuum inturbarentur. Molin. in cons. par. ad Art. 85. gl. 1. n. 38.*

Observe, that rent-service is not susceptible of compensation in this sense: the tenant cannot be discharged from going or sending to pay it, but it may be so far susceptible of it, that the tenant who is creditor of his lord for a sum of money, may, at the time and place at which the rent is payable, offer, in lieu of the money which he owes for the rent-service, a discharge for the like sum due to him by the lord; for by going and making this offer, he satisfies the obligation of acknowledging the seignory: such a compensation, however, ought not to be permitted, except where the rent consists of a sum rather considerable, and not in the case of a small sum, payable as an acknowledgment. (*les menus cens.*) *Dumoulin, ibid.*

The question, whether a debtor, who is obliged by an oath, to
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the payment of a debt, may, in point of conscience, as well as in point of law, oppose a compensation of what is due to him from his creditor, has already been touched upon. Several doctors, and more especially some canonists, have held the negative for a frivolous reason, that an oath ought to be accomplished in *forma specifica*. The opinion of those who hold the affirmative is preferable; an oath for the performance of an obligation only serves to render the debtor more culpable, if he contravenes it, and to induce him, through the fear of rendering himself guilty of perjury, not to do so: but an obligation, although confirmed by an oath, remains the same, and the oath does not prevent its being discharged in all the different ways in which obligations may be acquitted, and consequently by compensation. *Seb. de Med. Tr. de Compens. n. 2. § 25.*

Compensation may be opposed, not only against debts due to individuals, but even against debts due to towns, corporations or communities. The law 3. *Cod. de Comp.* however, excepts certain particular debts due to towns, to which the debtor is not permitted to oppose any compensation.

The law 1. *Cod. d. t.* admits a compensation even against the public revenue, upon condition however, that both the debt for which the compensation is made, and that opposed in compensation, belong to the same department: *rescriptum est compensationi in causa fiscali locum esse, si eadem statio quid debeat quæ petit. d. l. 1.* For instance, I could not oppose, in compensation of my capitation at Orleans, the arrears of an annuity due to me upon the tailles at Paris.

§ II. What Debts may be opposed in Compensation.

[590] For a debt to be opposed in compensation, it is necessary, 1st, that the thing due be of the same kind as that which is the object of the debt, against which the compensation is opposed: *compensatio debiti ex pari specie, licet ex causa dispari admittitur. Paulus sent. 11. v. 3.* For instance, I may oppose, in compensation of a sum of money which I owe you, the debt of a like sum which you owe me; these debts are *ex pari specie*: but I cannot oppose, in compensation of a sum of money which I owe you, the debt of a certain quantity of corn, which you owe me.

The reason is, that compensation being a payment, upon the same principle that I cannot insist upon paying any thing else to my creditor in lieu of what I owe him, *supra, n. 494.* I cannot oblige him to receive in compensation of a sum of money which I owe him,
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the corn that he owes me : for this would be obliging him to receive the corn for the money, consequently, to receive something different from what is due to him.

Although a debt of an indeterminate thing of a certain kind cannot be opposed to a debt of a certain specific thing of the same kind, as was observed in the preceding Article, n. 588. *contra, vice versa*, the debt of a specific thing may be opposed to a general debt of the same kind. For instance, I am your creditor for six pipes of wine, of a particular vintage, which you have sold to me, and your debtor for six pipes of wine generally, which a person to whom I have succeeded has left to you ; you cannot set off the quantity due from me against the particular wine which is due from you, because you have no right to offer any thing in payment but those six pipes of wine. On the contrary, if you demand the six pipes which I owe you generally, I may set off the six pipes which are due from you particularly, because, if that wine had been actually delivered, I might have offered it in payment of the wine which I owe to you.

Observe, that as this compensation, *speciei mihi debite ad quantitatem*, depends upon my choice, it does not take place until that choice is actually declared, and until I oppose such compensation ; whereas compensations which are made *quantitatis ad quantitatem*, take place immediately upon the debtor becoming also a creditor, as will be shewn in the sequel.

[591] The debt opposed by way of compensation must be fully due, *quod in diem debetur, non compensabitur antequam dies veniat*, L. 7. ff. de Comp. The reason is evident, compensation is a reciprocal payment by each of the parties ; now the debtor, whose credit is not expired, not being liable as yet to pay the debt, is not bound to allow it as a compensation for his own demand.

The term of payment which must be expired, in order to oppose the debt in compensation, is one to which the debtor is entitled by virtue of the agreement. It would be otherwise with respect to a term of grace. For instance, if I have a judgment against my debtor for 1000 livres, and the judge has allowed him three months to pay it, and a month after the sentence the debtor, becoming heir of my creditor, to whom I owe a like sum, demands it of me, I may oppose in compensation the debt which he owes me, although the term of three months allowed him, is not yet expired ; for it is only a term granted as a matter of grace, in order to stop the rigour of an execution, but which cannot delay the compensation : *aliud est diem obligationis non venisse, aliud humanitatis gratia tempus indulgeri solutionis*, L. 16. § 1. ff. de Compens.

[592] 3d, The debt opposed by way of compensation must be liquidated. *L. fin. (a) § 1. Cod. de Compens.*

A debt is liquidated when it is evident that it is due, and to what amount, *cum certum est, an et quantum debeatur*.

A disputed debt, then, is not liquidated, and cannot be opposed in compensation, unless the person who opposes it has proof at hand, and is in a situation to justify his claim promptly and summarily.

Even if it be evident that it is due, if it is not clear to what amount it is so, and if the liquidation depends upon an account of which a long discussion would be necessary, the debt is not liquidated, and cannot be opposed in compensation.

[593] 4th, The debt must be determinate; therefore, if a person charge his heir to give me a hundred pounds, or his two coach-horses, and I am indebted to the heir in the like sum of a hundred pounds, I cannot oppose the legacy to his demand, whilst he has an election to give me the horses, because the money is not due determinately. But if the choice had been given to me, I might insist upon the compensation, which, however, would only attach upon my choice being declared: "*si debeas decem millia aut hominem, utrum volet adversarius; ita compensatio admittatur, si adversarius palam dixisset, utrum voluisset.*" *L. 22.*

[594] 5th, The debt must be due to the very person who opposes it as a compensation, "*eius quod non ei debetur qui convenitur sed alii compensatio fieri non potest.*" *L. 9. Cod. dict. tit.*

Therefore, I cannot set off, against a debt due from myself, one which is due to a person of whom I am tutor or curator, or to my wife, having a separate estate.

If I had a community with my wife, what is due to her is due to me, and I may therefore oppose it to the claim of my creditor (b).

Papinian in *L. 18. § 1. ff. de Compens.* carries this principle so far as to decide, that my creditor is not bound to accept, by way of compensation, what is due from him to a third person, although that person intervenes, and expressly signifies his consent. "*Creditor compensare non cogitur quod alii quam debitori suo debet: quamvis creditor ejus pro eo, qui convenitur, proprium debitum velit compensare.*"

Thus, you demand a payment of a hundred pounds which is due to

(a) Ita tamen compensationes objici jubemus, si causa, ex qua compensatur, liquidata sit, & non multis ambagibus innodata.

(b) But the *English* law does not admit the husband to set off a debt due to the wife; nor, on the other hand, can a debt due from the wife be set off against a demand of the husband: the distinction of a community or separation of property does not exist, except through the medium of trustees. In the following instance, the *English* law would clearly not accord with the opinion which *Pothier* has adopted from *Barbeyrac*.

you from me. You owe the like sum to *Peter*, and I produce an instrument, by which *Peter* consents that the money due to him shall be allowed as a compensation for my debt to you. *Papinian* insists, that you are not bound to accede to this compensation; but *Barbeyrac*, in his notes upon *Puffendorf*, is justly of opinion, that *Papinian* has carried a legal subtlety too far, and that the compensation ought to be admitted. For, as it is indifferent to you whether you receive the money from *Peter*, or from me, it is unjust to institute your suit against me for the payment of this sum, when *Peter* is willing that you should receive it from him on my account, by way of compensation for that which you owe him.

There is a distinction, by which *Barbeyrac* may be reconciled with *Papinian*. If the sum which I owe to *Peter* is equal to that which you owe me, I cannot avoid a compensation, when you make *Peter* an intervening party to the suit, and he consents to it; in this case, the opinion of *Barbeyrac* ought to be adopted. But if the sum which you owe to *Peter* is less than my debt to you, notwithstanding *Peter* may agree to the compensation, you are not obliged, according to the decision of *Papinian*, to accept of it, unless at the same time I offer to pay you the balance; for, otherwise, you would be obliged to accept of your debt by parcels, which you are not bound to do. It is only where I am personally your creditor, to the amount of part of the debt due from me to you, that compensation takes place, and, notwithstanding your dissent, extinguishes your demand, so far as the two accounts concur.

It is the concurrence of the qualities of debtor and creditor in the same person which induces *pleno jure* a compensation to the extent of their concurrence; as a person cannot be truly my creditor, without deducting what is due from him to me, nor my debtor, without the like deduction of what is due from me to him.

A person to whom the rights of a creditor are ceded, is not, according to the subtlety of law, a creditor, but only a procurator, or attorney in *rem suam*. Nevertheless, as he is in effect a creditor, when he has given notice to the debtor of the transfer of the debt, he may oppose the compensation of such a debt against a demand from him by the debtor, as much as any debt due to him on his own account: *in rem suam procurator datus, si vice mutua conveniatur equitate compensationis utetur. L. 18. ff. de Comp.*

[595] The rule which we have just established, that we can only oppose by way of compensation what is due to ourselves, is subject to an exception in the case of sureties. A person required to pay a sum of money, to which he is liable as a surety, may oppose as a compensation, not only what is due from the creditor to himself,

himself, but also what is due to the principal debtor. “ *Si quid a fidejussore petitur equissimum est fidejussorem eligere quod ipsi, an quod reo debetur compensare malit. L. 5. ff. d. t.* ”

The reason is, that it is of the substance of such an engagement that the surety cannot be obliged to more than the principal, and, consequently, that he may avail himself of all the same grounds of defence: *supra*, n. 380. Now the principal debtor may oppose, by way of compensation, what is due from the creditor to him; consequently, the surety may also oppose the compensation of the same debt.

It is not the same *vice versâ*; the principal cannot oppose to his own creditor the compensation of a debt to his sureties.

As to whether a debtor in solido may oppose what is due to his co-debtor, *vid. supra*, n. 274.

[596] The debt which is opposed as a compensation must be due from the same person to whom it is opposed. For instance, if a person demands from me the payment of his debt, I cannot oppose to him, by way of compensation, a debt from the minors, to whom he is tutor; and *vice versâ*, if in his quality of tutor he demands from me the payment of the debt due to the minors, I cannot oppose a compensation of what he owes me himself: “ *Id quod pupillorum nomine debetur, si tutor petat non posse compensationem objici ejus pecuniæ quam ipse tutor suo nomine debet.* ” *L. 23. d. t.*

For the same reason, I cannot oppose to my creditor a compensation of what his wife owes me, when she has a separate property; but I may do it, if their property is held in common, because he is bound for the debts of his wife, and has himself become debtor by the community of property between them. This would hold good, even if there had been a clause of separation, with respect to debts; unless he proves by an inventory that there is no money of his wife in his hands; for, otherwise, he is debtor of what is due by his wife. An argument may be drawn in favour of our decision, from the law 19. (a) which decides, that the compensation of what is due by a slave may, to the extent of his *peculium*, be opposed to the master; the debt of the slave being to that extent the debt of the master.

If my creditor has transferred the debt which is due from me, I may oppose to the demand of the assignee, not only what is due from himself, but also what is due from the original creditor, provided his debt to me was contracted before I had notice of the transfer; for as the credit could not pass to the assignee, until it

(a) Debitor pecuniam publicam servo publico citra voluntatem eorum solvit, quibus debitum recte solvi potuit; obligatio pristina manebit, sed dabitur ei compensatio peculii fini quod servus publicus habebit.

was notified to the debtor, according to the maxim of the law of France, *transport ne saisit s'il n'est signifié*; and as it rests till that time in the original creditor, the claims which I in the mean time acquire against him, extinguish *pleno jure*, so as far they concur the claims which he has against me.

If the mutual credit is given after notice of the transfer, it does not produce any compensation, because, by the signification of such transfer, the person transferring has ceased to be my creditor; or, if he is so, it is merely *subtilitate juris, et non juris effecti*.

Although I were creditor previous to the transfer, yet if, purely and simply, I assented to such transfer, with full knowledge of my right, I should be deemed to have renounced the right of compensation, and could not oppose it to the assignee, who had relied upon my assent (my rights against the original creditor being saved). This was decided by some *arrêts*, cited by *Despeisses*.

[597] According to the principles of the Roman law, I may oppose to you, in compensation of what I owe you here, a sum which you owe me, payable in another place, allowing the expence of remitting it from that place to this. L. 15. (a) *ff. de Comp.* A creditor, according to the principles of the Roman law, having an action *de eo quod certo loco*, to oblige his debtor to pay, in the place where he happens to be, a sum payable in another place, upon allowing the expence of a remittance, he may consequently oblige him to compensate. But this action, *de eo quod certo loco*, not being in use with us, and as the creditor cannot demand the payment of a sum payable in a certain place, any where else than in that place, *supra*, n. 239, it would seem a necessary conclusion, that he could not oppose it in compensation of what he owed in another place; nevertheless, *Domat. P. 1. L. 4. T. 2. sect. 2. n. 8*, thinks that this compensation ought to be admitted, upon allowing the value of the remittance. This appears sufficiently equitable, as compensation is very favourable.

[598] It is evident, that I cannot oppose to you, in compensation of what I owe you, the principal of an annuity, which you owe to me, but merely the arrears which have accrued; for the principal of an annuity is not properly due, it is only in *facultate lutionis*.

§ III. How a Compensation is made; and of its Effects.

[599] Compensation is made *pleno jure, placuit quod invicem debetur ipso jure compensare*, L. 21. *ff. de Comp.* There was,

(a) *Pecuniam certo loco a Titio dari stipulatus sum: is petit a me, quam ei debeo, pecuniam: quero an hoc quoque pensandum sit, quanti mea interfuit, certo loco dari? Respondit, si Titius petit, eam quoque pecuniam, quam certo loco promisit, in compensationem deduci oportet: sed cum sua causa, id est, ut ratio habeatur, quanti Titii interfuit, eo loco, quo convenerit, pecuniam dari.*

however,

however, in this respect, according to the *Roman* law, a difference between debts proceeding from contracts *bonæ fidei*, and those proceeding from contracts *stricti juris*. This difference was abrogated by the constitution of *Justinian*, in the law *fin. cod. d. t. Compensationes ex omnibus ipso jure fieri sancimus. d. l.*

When it is said that compensation is made *ipso jure*, it means that it is made by the mere operation of law, without being pronounced by the judge, or opposed by the parties.

As soon as a person who was creditor of another becomes his debtor of a sum of money, or other matter susceptible of compensation with that of which he was a creditor; and *vice versâ*, as soon as a person who was debtor of another, becomes his creditor of a sum susceptible of compensation with that of which he was debtor, a compensation is made, and the respective debts are from thenceforth extinguished, to the extent of their concurrence, by virtue of the law of compensation.

This interpretation is conformable to all the explanations which lexicographers have given to the term *ipso jure*. *Ipso jure fieri dicitur*, says Brissot, *quod ipsa legis potestate et auctoritate absque magistratus auxilio et sine exceptionis ope fit. Verba ipso jure*, says Spigelius, *intelliguntur sine pacto hominis. Ipso jure consistere dicitur*, says Prætorius, *quod, ex sola legum potestate et auctoritate, sine magistratus opera, consistit.*

Our principle, that compensation extinguishes mutual debts, *ipsa juris potestate*, without being opposed, or pronounced, is established not only by the term *ipso jure*, a term to which no other sense can be given, but also by the effects which the texts of law give to compensation.

For instance, *Paulus, sent. 11. 5. 3.* says, that if my creditor demands from me the whole sum of which he was creditor, without offering to deduct the amount for which he has become my debtor, he incurs by this demand the penalty of an excessive claim, *si totum petat, plus petendo, causa cadit*, which evidently supposes our principle, that even before I have opposed a compensation to my creditor, the debt for which he has become my debtor has already lessened, and extinguished his demand so far as they concur.

The other effects of compensation about to be mentioned, likewise establish our principle.

With regard to those texts of law, which have been usually opposed to this principle, and which speak of compensation opposed to the demand of a creditor, and of compensations admitted or rejected by the judge, they contain nothing from which it ought to be concluded, that compensation cannot take effect, without being opposed or pronounced. It is true, that if a person who was my

creditor of a certain sum, and has since become my debtor for as much, institutes a demand against me for payment, I shall be obliged, in order to protect myself, to oppose the compensation of the sum for which he has become my debtor; otherwise, the judge, who sees the proofs of his demand against me, and who cannot divine the demand which I have on my part against him, would of course decide in his favour. Mention is therefore made in these texts of compensations opposed by a party, admitted or rejected by the judge; but it ought not to be concluded from thence, that the debt was not previously acquitted by force of the compensation. I am only obliged to oppose the compensation for the purpose of informing the judge, that it has taken place; in the same manner as I am obliged, if any one demands a debt from me which I have paid, to oppose and produce the acquittances.

It is also usual to oppose to our principle the *L. 6. cod. de Compens.* in which a compensation is called *mutua petitio*; and which seems to suppose that the respective actions of the parties subsist until the judge has pronounced a compensation. The answer is, that it is only in a very improper sense that the compensation opposed by the defendant is, in this law, called *mutua petitio*, which only signifies the simple allegation of the mutual demand of the defendant, by which that of the plaintiff was extinguished. Our answer is founded upon the law 21. *ff. de Comp* where it is expressly shewn, that the person alleging the compensation does not make a reciprocal demand, but merely defends himself from the demand against him, by shewing that, so far as the amount of the sum opposed in compensation, it does not subsist: *postquam placuit inter omnes*, says this law, *id quod invicem debetur ipso jure compensari, si procurator absentis conveniatur, non debet de rato cavere* (a), before he is admitted to allege the compensation, which he would be if he was making a demand or opposite claim: "*quia nihil compensat, sed ab initio minus ab eo petitur*;" that is to say, "*non ipse compensat, non ipse aliquid mutuo petit, sed allegat compensationem ipso jure factam, quæ ab initio jus petitoris ipso jure minuit.*"

[600] The effects of compensation are the consequences of the principle thus established; these are, 1st, that if my creditor, to whom I have given goods in pledge, becomes my debtor, I may reclaim the goods upon offering the balance, if, any, in his favour; the compensation of the debt due to me being equivalent to a payment. This is the decision of the law 12. (b) *Cod. de Compens.*

(a) This may be translated—give pledges to prosecute.

(b) *Invicem debiti compensationem habita, si quid amplius debeas, solvens, vel accipere creditore nolente offerens et consignatum deponens, de pignoribus agere potes.*

2d, If you had a debt due from me which carried interest, and afterwards became my debtor of a sum, which from its nature did not carry interest, my debt would be held to be discharged to the extent of the mutual credit, from the time of such credit taking place, and interest would only be due for the balance from that time. For instance, if you were my creditor of a sum of 1000*l.* for the price of an estate which you have sold and conveyed to me, and afterwards you became sole heir to *Peter*, who owed me the sum of 800*l.* for a loan; from the time of your becoming heir to *Peter*, and in that quality my debtor of 800*l.* that is, from the death of *Peter*, your demand of 1000*l.* is to be regarded as acquitted to the amount of 800*l.* and subsisting only for the remaining 200*l.* and from that time the interest will only continue to run upon the remaining 200*l.* This is decided by the constitution of *Severus*, as stated by *Ulpian*; “*Cum alter alteri pecuniam sine usuris, alter usurariam debet, constitutum est a divo Severo concurrentis apud utrumque quantitatis usuras non esse præstandas.*” *L. 11. ff. de Compens.*

The same decision occurs in the constitution of *Alexander*: “*Si constat pecuniam invicem deberi, ipso jure pro soluto compensationem haberi oportet ex eo tempore, ex quo ab utraque parte debetur utrique quoad concurrentes quantitates, ejusque solius quod amplius apud alterum est usura debentur.*” *L. 4. Cod. dicto titulo.*

This effect only takes place in ordinary compensations, *quantitatis certæ ac determinatæ ad certam ac determinatam quantitatem*: which operate *pleno jure*; but, upon compensations which only take effect from the day of their being opposed, the interest only ceases from that time. For instance, if you were my creditor of 100*l.* for the price of an estate which you have sold to me, and which consequently carried interest, and afterwards become sole heir of *Peter*, who has left me two coach horses, or 100*l.* at my choice; the interest of the 100*l.* due to you would not cease from the day of the death of *Peter*, on which you became my debtor of the legacy, but only from the day when I declared my choice of the 100*l.* for my legacy; as it is only from this day that a compensation takes place, as we have already observed, *supra*, n. 593.

[601] Although my creditor is not bound to receive a real payment in parcels, *supra*, n. 498. yet, if he becomes my debtor for a less sum, he is obliged to suffer a partial discharge of his debt, by virtue of the compensation, as results from the laws above cited.

[602] 4th, If I were your debtor of 3000*l.* upon three different accounts, and afterwards become your creditor of 1000*l.* the compensation of my demand of 1000*l.* ought to be made against that debt which it is most my interest to acquit. The reason

is, that as compensation is in lieu of a payment, and as payments are applied to that debt which the debtor has most interest to discharge, *supra*, n. 530. compensation ought to be made in the like manner.

This decision only applies when all the debts from me to you were incurred previous to the demand which I have acquired against you. But if being your debtor of 1000*l.* I became your creditor of the same sum, and afterwards contracted a new debt in your favour; although I might have a greater interest in acquitting the last debt than the first, you may demand the payment of it, without my being entitled to oppose the compensation of the debt from you, as this became extinct as soon as it arose, being *pleno jure* compensated with my former debt. *Tindar. tract. de Comp. Art. 7. in fin. Sebast. Med. P. 2. § 12.*

[603] If my creditor of a certain sum afterwards becomes my debtor to the same amount, and, notwithstanding the compensation which has *pleno jure* extinguished our respective demands, I pay him the amount of his debt, I may recover the sum which I have so paid, by the action called *condictio indebiti*. This is decided by *Ulpian*, in the law 10. (a) § 1. *ff. de Compens.*

This text proves very evidently the principle which we have established, that compensation is made *pleno jure*, and, by mere operation of law, extinguishes the respective debts, without its being opposed by the parties, or pronounced by the judge; otherwise, if, at the time of payment, no compensation had been opposed, or pronounced, it could not be said that I had paid what I did not owe.

Hence arises a question upon the following supposition: I was your debtor for 1000*l.* I have since become sole heir to *Peter*, who was your creditor for a like sum, upon a partition of property: notwithstanding the compensation, I have paid you the 1000*l.*; afterwards your effects, and especially those which were allotted to you by the partition with *Peter*, have been seized by your creditors. I oppose the decree, and demand a preference out of the price of these goods, for the money due to me as heir of *Peter*, on account of the privilege attached to partitions; are the other creditors entitled to oppose this preference? it appears that they are; for the demand of *Peter* upon the partition became extinct, by virtue of the compensation, upon my succeeding to it: the payment which I afterwards made could not revive our respective demands, which the compensation had extinguished; it could only give me a simple action to recover the sum which I paid you, as having been paid

(a) Si quis igitur compensare potens, solverit, condicere poterit, quasi indebito soluto.

when it was not due; and this action has no hypothecation, or at most a simple hypothecation, from the day of the acquittance, if it was before a notary. It ought not to be in my power, by voluntarily paying you a debt which was extinguished by the compensation, to revive my demand, and the hypothecation attached to it, to the prejudice of the other creditors, and of the right of priority in hypothecation, which they had acquired by the extinguishment of our respective demands.

Notwithstanding these reasons, I think, that a distinction must be made upon this question. If, after the succession of *Peter* had devolved upon me, but before I knew of the demand against you, I paid you the 1000/. which I owed you, I think I ought to retain my priority for the demand to which I have succeeded, and that in this case no compensation should be deemed to have taken place. The reason is, that compensation being a fiction of law, which supposes the parties to be respectively paid, as soon as they become at once creditors and debtors, such fiction, which is established in favour of the parties between whom the compensation is made, should only take place where it is not prejudicial to them, and has not led them into any error, for a benefit of the law ought never to be prejudicial to those in whose favour it is constituted; *beneficium legis non debet esse captiosum*. It ought not then to be supposed that there is any compensation in this case; for it would be prejudicial to me; it would lead me into an error; it would, without any fault of mine, be the cause of my losing 1000/. for which I had a privileged hypothecation. It must be decided otherwise, if I did not pay you the 1000/. till after the inventory of the succession of *Peter* had been taken, which apprized me of the demand that the succession had against you; there is nothing in this case to prevent its being held that the compensation has extinguished our respective demands, it is not the law of compensation which has caused me any prejudice, or led me into an error. If I lose the 1000/. which I have foolishly paid to you, I ought not to impute it to the law of compensation, but to myself, in having voluntarily paid you a debt which I knew was acquitted by the compensation; and it ought not to be in our power by this payment to revive my demand in fraud of the right acquired by subsequent creditors.

[604] What ought to be decided in the following case? I was your debtor for 1000/.; I have since become your creditor for the same amount; as, by becoming sole heir of *Peter*, to whom you owed a like sum; upon being sued by you, I have neglected to oppose the compensation of the debt from you to me; I am condemned to pay you, and have paid in execution of the sentence: have I any redress? I cannot, as in the preceding in-

stance, have an action *condictio indebiti*. The law 2. *Cod. de Comp.* (a) decides, that although I might oppose the compensation of my demand against your action, in execution of the sentence, the action *condictio indebiti* cannot be maintained, because a person who has paid in execution of a sentence cannot be regarded as having paid without a cause: now, the action *condictio indebiti* only attaches, when the payment has been made without any cause, and consequently, without a sentence: *pecunia indebita per errorem, non ex causa judicati soluta esse repetitionem jure condictionis non ambigitur. L. 1. Cod. de Cond. indeb.* Shall I then, in this case, be deprived of all redress? Under the circumstances it should be held that, although according to the subtlety of law, the compensation extinguished our respective demands from the instant that I succeeded to the demand which *Peter* had against you, yet, this compensation ought to be regarded as not having taken place; the demand to which I have succeeded, and the action arising from it, ought to be restored to me, and I should be admitted to the prosecution of it. The reason is, that this compensation having by the sentence been deprived of its effect against you, and with respect to your demand against me, the principle of equity does not allow it to subsist against me, and with respect to my demand against you. This is properly decided by *Tindarus*, in his treatise *de Compens.* and it is in this sense that he explains the law 7. § 1. *ff. de Compens.* which says, *si rationem compensationis judex non habuerit, salva manet petitio*; that is to say, where the judge has condemned one party in favour of the other, notwithstanding the compensation which had extinguished their respective demands, whether it had not been opposed, or, being opposed, the judge had omitted to decide upon it; the demand which the party against whom the decision is made had upon the other, is preserved, *salva manet petitio. Lex enim*, says *Tindarus*, *hoc casu restituit actionem peremptam, ex maxima necessitate, sicut facit in multis casibus, aequitate suggerente, v. L. 1. in fin. ff. ad. Vellejan.*

Is my demand restored with or without the hypothecations which were attached to it? I think this question must be answered with a distinction; if there is no ground to suspect that it was by collusion with you, and in order to give you the money, to the prejudice of your creditors, that I have omitted to oppose the compensation of the demand to which I have succeeded: for instance, if, at the time of the sentence, the death of *Peter* was scarcely known, or at least the inventory of his succession, which alone could give me any knowledge of the demand, had not been made, I think that my demand ought to be restored with its hypothecations; but if, with no-

(a) Ex causa quidem judicati [si debitam] solum reperti non potest, ea propter nec compensatio ejus admitti potest. Eum vero qui judicati convenitur, compensationem pecunie sibi debitae implorare posse nemine dubium est.

rice of the demand, I had suffered myself to be condemned in your favour, without opposing the compensation, or had only opposed it *perfunctoriè*, without establishing it, so that the judge did not determine it in my favour; in this case, my claim will indeed be restored, but I shall not be permitted to exercise the hypothecations attached to it, to the prejudice of the creditors subsequent to me in the order of hypothecation, and who, upon my succeeding to the claims of *Peter*, have acquired a priority of hypothecation, by the compensation and extinction which then took place of our respective claims; as it is contrary to equity, that, by a collusion between you and me, I should deprive the creditors of the right which they have acquired.

C H A P. V.

Of the Extinction of a Debt by Confusion.

[605] By confusion is meant the concurrence of two qualities in the same subject, which mutually destroy each other.

The particular instance of it at present under consideration, is the concurrence of the characters of creditor and debtor, of the same debt in the same person. We shall examine, 1st, In what cases this confusion takes place; 2d, The effect of it.

The *Roman* jurists admitted another kind of confusion, in the case of a surety succeeding to the principal debtor, *aut vice versâ*; of this we shall say nothing at present, having already treated of it, *supra*, Part II. ch. 6. § 1. Corol. 6.

§ I. *In what Case this Confusion takes place.*

[606] This confusion takes place, when the creditor becomes heir of his debtor, or *vice versâ*, when the debtor becomes heir of the creditor; for the heir succeeding to all the rights of the deceased, and being subject to all his obligations, (*succedant à tous les droits, tant actifs que passifs*) when the creditor becomes the heir of the debtor, he becomes, in his quality of heir, debtor of the very same debt of which he is creditor on his own account; and *vice versâ*, when the debtor becomes the heir of the creditor, he becomes creditor in that quality of the same debt, of which he was on his own account the debtor. In both these cases, the qualities of creditor and debtor of the same debt become united in the same person.

The same consequence ensues when the creditor succeeds to the debtor, by any other title which renders him subject to his debts, as if he is his universal donatary; and where the debtor succeeds, by whatever means, to the right of the creditor. In all these cases, the

the qualities of creditor and debtor of the same debt concur in the same person.

The same thing occurs when the same person becomes the heir, both of the debtor and creditor, or succeeds to both of them under any universal title.

The acceptance of a succession upon trust, to render a specific account (*sous bénéfice d'inventaire*), does not induce any confusion, for it is one of the effects of the *bénéfice d'inventaire*, that the beneficiary heir and the succession are regarded as different persons, and their respective rights are not confounded.

Of the Effects of Confusion.

[607] It is evident that by the concurrence of the opposite characters, of debtor and creditor in the same person, the two characters are mutually destroyed : for, it is impossible to be both at once ; a person can neither be his own creditor or his own debtor. From hence indirectly results the extinction of the debt, when there is no other debtor ; for as there can be no debt without a debtor, and the confusion having extinguished the character of debtor, in the only person in whom it resided, and there being no longer any debtor, there cannot be any debt. *Non potest esse obligatio sine persona obligata.*

[608] The extinction of the principal debt, which takes place by confusion, when the creditor becomes heir of the principal debtor, or *vice versa*, induces an extinction of the obligations of the sureties, *L. 38. (a) § 1. ff. de Fid. L. 34. (b) § 8. L. 71. (c) ff. de Solut.* for, as the obligations of the sureties are merely accessory to that of the principal, *fidejussor accedit obligationi rei principalis*, they cannot subsist any longer than the principal obligation, to which they accede according to the rule of law. “ *Quum principalis causa non subsistit, ne ea quidem quæ sequuntur locum habent.*” *L. 129. § 1. ff. de Reg. Jur.* and, “ *Quæ accessionum locum obtinent, extinguuntur cum principales res præemptæ fuerint.*” *L. 2. ff. de Pecul. Leg.*

(a) A Titio, qui mihi ex testamento sub conditione decem debuit, fidejussorem accipi, et ei heres extiti : deinde conditio legati extitit : quero an fidejussor mihi teneatur ? Respondit, si ei a quo tibi erat sub conditione legatum, cum ab eo fidejussorem accepisses, heres extiteris, non poteris habere fidejussorem obligatum, quia nec reus est, pro quo debeat, sed nec res ulla quæ possit deberi.

(b) Quidam filium familias a quo fidejussorem acceperat, heredem instituerat. Quæsitum est, si jussu patris adisset hereditatem, an pater cum fidejussore agere posset ? Dixi, quotiens reus satisfaciendi reo satis accipiendi heres existeret, fidejussores ideo liberari : qui pro eodem apud eundem debere non possent.

(c) This law is not applicable to the subject.

Besides,

Besides, the existence of a surety implies that of a principal debtor, on whose behalf the surety is obliged ; therefore, when, by reason of the confusion, there is no longer a principal debtor, for whom the surety is obliged, there can be no longer any surety. This reason is given in *L. 38. § 1. ff. de Fid. quia nec reus est pro quo debeat.*

And it is also a repugnancy that I should be a surety to any man for himself, it therefore necessarily follows, that the obligation of the surety is extinguished, when the principal, by succeeding to the rights of the creditor, is the very person entitled to the benefit of the obligation. *Fidejussores ideo liberari, quia pro eodem apud eundem debere non possunt, h. 34. § 8. de Solut.*

[609] *Contra vice versâ*, the extinction of the accessory obligation of the surety by confusion, does not induce an extinction of the principal obligation. *Si creditor fidejussori heres fuerit, vel fidejussor creditori, puto convenire confusione obligationis non liberari reum. L. 71. ff. de Fidejuss.* The reason of the difference is, that though the accessory obligation cannot subsist without the principal, the principal does not in any degree depend upon the subsistence of the accessory.

Confusion in this respect differs from payment ; for, by payment the thing is no longer due ; the thing when paid ceases to be due by whomsoever the payment may be made. Now, there can be no debtor either as principal or accessory, when there is no longer any thing due : therefore, the payment by the surety having produced the effect, that what was due from him (being the same thing which was due from the principal) is no longer owing at all ; and there being nothing owing, it necessarily follows, that the obligation of the principal is extinct, as well as that of the surety by whom the payment was made.

It is the same thing when there is a real release, compensation, novation, or any other kind of liberation, which is equivalent to payment.

On the contrary, the only effect of confusion is that the person of the debtor, in whom the character of creditor concurs, ceases to be obliged, because no man can be obliged to himself, *personam eximit ab obligatione* ; but there is nothing to prevent the subsistence of the obligation of the principal debtor, although there may be no longer any obligation in the surety.

For the same reason, when a creditor of two debtors. in solido, becomes the heir of one of them ; or *vice versâ*, when one of them becomes heir of the creditor, the obligation of the other debtor continues to subsist.

In regard to the question, whether it subsists as to the whole, the law

law 71. *ff. de Fidej.* decides, that if the debtor in solido were in partnership, the one who only owed the whole, subject to recourse against the other in whose person the confusion took place, was only obliged as to the portion for which he had no such recourse, as it would be unjust that he should lose his right in consequence of the confusion.

According to the laws of *France*, as each of the debtors in solido, although not engaged in partnership, has recourse against the others for their shares, as we have seen, *supra*, n. 28, it must be stated indiscriminately, that in case of a confusion taking place in the person of one of the debtors in solido, the other will only be obliged, subject to the deduction of so much as he could have claimed from the party, in whom the characters unite; we have already seen, *supra*, n. 275., that if the creditor discharges one of the debtors in solido, the other only continues obliged for so much as he could not have claimed from the first, if he had paid the whole. For the same reason, the co-debtor of the party, who is discharged by way of confusion, should only be liable, subject to the deduction of that part for which he would have had recourse against him.

[610] If a person to whom *Peter* owed a certain sum, has transferred that debt to me, and before *Peter* has acceded to, or had regular notice of the transfer, the creditor has become his heir, there will indeed be a confusion and extinction of the debt; but as the creditor, in consequence of the transfer, became my debtor, as to that particular claim, and as it is by accepting the succession, which is his own act, that the credit is extinct, he is answerable to me for the amount; for every debtor is bound to pay the value of what was due from him, when it has ceased to exist in consequence of his own act, as we shall see, *infra*, n. 625.

If the transfer had been assented to, or notified previous to the time of the person by whom it was made becoming heir of the debtor, there would be no confusion, because he would, in effect, have been no longer the creditor, and I should have become so in his stead.

[611] If the creditor becomes heir not of the debtor himself, but of the person against whom the debtor has a right of indemnity, there will not, properly speaking, be any confusion of the debt, but it will nevertheless be indirectly and effectively extinguished. The creditor cannot enforce the payment of it from the debtor, after succeeding to the obligations of the party, who was bound to indemnify him.

[612] In order to induce a confusion of the debt, the characters not only of debtor and creditor, but of sole debtor and sole creditor, must concur in the same person.

If a person, who was only creditor for part, becomes sole heir of the debtor, it is evident that the confusion and extinction can only take place, with respect to the part for which he is creditor; *vice versa*, if a creditor of the whole becomes heir of the debtor for part, the confusion only takes place with respect to that part.

It is equally evident, that if the creditor is only one of several heirs to the debtor of the whole, the confusion and extinction only takes place in respect of the part for which he is heir, and for which he is liable to all the other debts of the succession; the demand continues to subsist against the others, as to the parts for which they are respectively liable to the debts of the deceased. *L. 50. ff. de Fid. L. 4. Cod. de Hered. Act. (a).*

C H A P. VI.

Of the Extinction of an Obligation by the Extinction of the thing due; or when it ceases to be susceptible of Obligation; or when it is lost, so as not to be known where it is.

A R T I C L E I.

General Exposition of the Principles respecting this mode of Debts becoming extinct.

[613] There cannot be any debt without something being due, which forms the matter and object of the obligation; whence it follows, that if that thing is destroyed, as there is no longer any thing to form the matter and object of the obligation, there can be no longer any obligation. The extinction of the thing due, therefore, necessarily induces the extinction of the obligation. *(b) L. 33. 37. (c) ff. de verb. Oblig.*

[614] For the same reason, if the thing which was due, in consequence of something that afterwards occurs, is no longer susceptible of being the matter and object of an obligation, the obligation itself cannot continue. That is the case where the thing which was due can no longer be an article of commerce: therefore, *Ulpian* says: *Is qui alienum servum promisit, perducto eo ad libertatem, non tenetur. L. 51. (d) ff. de verb. Oblig.*

(a) Vide Appendix, No. XIV.

(b) Si Stichus certo die dari promissus, ante diem moriatur, non tenetur promissor.

(c) Vi. au 10. Mort. 268. 40 E. 3. 62 Noy's, max. 35. 1 Rep. 98. In the case of Williams v. Hyde, Palmer, 548. the plaintiff declared, that in consideration he had lent the defendant a horse, the defendant promised to redeliver it. The defendant pleaded that in consequence of diseases the horse died, so that it could not be delivered, and the plea was adjudged good.

(d) Si certos nummos, puta qui in arca sunt, stipulatus sim, et hi sine culpa promissoris perierint: nihil nobis debetur.

According to this principle, if you were bound to convey to me a certain plot of land, which afterwards, under the authority of the law, was taken for a common highway, my claim upon that plot of land would be extinct; for, being no longer susceptible of contracts, it cannot be the object and matter of a claim or obligation; therefore, as there is no longer any thing which can form an object of my claim, the claim itself cannot subsist.

[615] An obligation becomes extinct, not only when the object of it ceases generally to be susceptible of obligation, but also when the thing due to me is no longer susceptible of being so, although it may be susceptible of an obligation in favour of another person.

The first example of this is in *L. 136. (a) § 1. ff. de verb. Oblig.* You engage to procure a right of way for me to my estate over an adjoining field. Before the right is granted, I sell the estate without transferring the benefit of the contract; the claim is extinct, because the right of way, which was the object of it, cannot be due to me, as such a right could only belong to the owner of the estate.

[616] A second instance, is that where a person, to whom a specific thing was due under a lucrative title, becomes the owner of that thing under another lucrative title; the claim in respect of it is extinct. *Omnes debitores qui speciem ex causa lucrativa debent, liberantur, cum ea species ex causa lucrativa ad creditores pervenisset. L. 17. ff. de Oblig. et Act.*

The reason of this arises from the principle already stated. When I become proprietor of what was due to me, it cannot any longer be due to me, for another person can never owe me that which is already my own. It is a repugnancy that any one should be under an obligation, of giving me that I already have. *Nam quod meum est, amplius meum fieri non potest.* The obligation therefore cannot subsist, since there is no longer any thing to form the subject of it.

From this rule the corollary is deduced, *Due causa lucrativa, in eandem rem et personam, concurrere non possunt.*

[617] In order to induce the extinction of a debt, by the creditor becoming proprietor of the thing due, it is necessary that he should have acquired a full and absolute property in it; if that is not the case, the debt subsists, and the debtor is bound to do what remains in order to perfect and complete the property.

For instance, if a person left me an estate, which he knew did not belong to him, and after his death, and before the accomplishment of the legacy, the proprietor had made me a donation of the

(a) Si qui rem ad fundum suum dari stipulatus fuerit, postea fundum partem ve ejus ante constitutam servitutem alienaverit; venescit stipulatio.

same estate, reserving the usufruct, my claim, in respect of this estate upon the heir of the testator, is not extinct, though I have become proprietor of the thing which was due to me, because something is wanting to complete my property, viz. the usufruct with which my estate is charged; the heir then, so far continues my debtor of the estate, that he must purchase the usufruct for me or pay me the value of it.

If the gift had been of the whole property, but subject to revocation upon any event, as the birth of a child (a), the donor not having any at the time of the donation, there is still something wanting to complete my property, according to the rule, "*Non videtur perfecte cujusque id esse, quod ei ex causa auferri potest.*" L. 139. § 1. ff. de Reg. Jur. Therefore, the debtor remains under the obligation of preserving the estate to me, in case of such event taking place.

[618] It is also necessary to the extinction of my claim, that my property in the thing due should arise from a lucrative title. If I only acquired it by an onerous title, as by purchasing it, the debtor is not liberated; for I cannot be deemed to have perfectly acquired it, when I have paid any thing for the acquisition; *hactenus mihi abesse res videtur, quatenus sum praestaturus.* L. 34. § 8. ff. de Leg. 10. My claim then subsists so far as to entitle me to a reimbursement of what I have paid.

[619] Lastly, for my claim to be extinguished when I become proprietor, although by a lucrative title of the thing due to me, the claim must also be founded upon a lucrative title; for if I were creditor upon an onerous title, as by purchase, the claim would not be extinguished. "*Quum creditor ex causa onerosa, vel emptor, ex lucrativa causa rem habere ceperit nihilominus integras actiones retinent.*" L. 19. ff. de Oblig. et Act. adde L. 13. (b) § 15. ff. de Act. Empt.

For instance, if I buy from you an estate to which you have no title, and afterwards I become proprietor by a donation or legacy from the real owner, my claim arising from the sale is not extinct; because every debtor, upon an onerous title, such as a seller, is bound to warrant the thing due, and this warranty consists in the obligation of the seller to cause the buyer to have the thing purchased by virtue of the sale, *præstare emptori rem habere licere ex causa venditionis ipsi factæ.* It is sufficient then to support the obligation of warranty, if my ownership of the property does not result from the sale, although I become the proprietor by other means.

(a) This seems to be a condition implied by law in case of a donation.

(b) Si fundum mihi alienum vendideris, et hic ex causa lucrativa meus factus sit, nihilominus ex empto mihi adversus te actio competit.

[620] There is little difference between a thing being lost, so that it cannot be known where it is, and its having actually ceased to exist. Therefore, if this loss takes place without any fault in the debtor, as when the thing is taken by robbers, the debtor is liberated as much as if the thing had no longer existed, with this difference, that as a thing once destroyed can never be renewed, the debtor is in that case absolutely liberated from his obligation; whereas the thing which is only lost may be recovered, and in this case the debtor is only liberated whilst the loss continues.

There remains a question upon this subject; where the debtor of a specific thing, who has not taken upon himself the risk of accidents, and is only answerable for his own neglect, alleges that the thing is lost without his fault, or by accident, is it incumbent on the creditor to prove that the loss was occasioned by the fault of the debtor, or, on the other hand, must the debtor prove the accident which he alleges to have taken place? I think that the proof is incumbent on the debtor. If the person who asserts a claim is obliged to shew the foundation of that claim by proof, the other party is equally bound to prove what constitutes the foundation of his defence. The creditor who demands payment of what his debtor has engaged to give him, ought to prove the credit which is the foundation of his demand. The debtor who resists that demand, upon the plea that he is discharged by an accident, which occasioned a loss of the thing due, should prove the accident which is the foundation of his defence.

This is conformable to the doctrine of *Ulpian*, L. 19. ff. de Prob. “*In exceptionibus dicendum est reum partibus actoris fungi oportere, ipsumque exceptionem velut intentionem implere, id est, probare debere.*”

A R T I C L E II.

What kind of Obligations are subject to be extinguished by the Extinction of the thing due, or upon its losing the Capacity to be due.

[621] It is evident that obligations of a certain specific thing are extinguished, with the extinction of that thing.

With respect to alternative obligations, they are not extinguished by the extinction of one of the things due in the alternative; but the obligation, which was before alternative, becomes determinate in respect of the other which remains. The reason is, that in case of an alternative obligation of two things, both the things are due, *supra*, n. 246. If any one remains, that one continues due, and consequently suffices for the subject of the obligation.

For

For instance, if you have two horses, and engage to give me one of them, the death of one will not extinguish the obligation, and you will be bound to give me the other; *non jam alternatè, sed determinatè*.

It is the same, if one of the things due to me in the alternative is no longer capable of being due to me; as if I become the owner, upon a lucrative title, of the one, the obligation subsists as to the other. *Si Stichum aut Pamphilium mihi debeas, et alter ex eis meus sit factus ex alia causa, reliquus debetur mihi à te. L. 16. ff. de Verb. Oblig.*

The principle which we have established, that an alternative obligation is not extinguished by the extinction of one of the things due in the alternative, or upon its no longer being susceptible of the obligation, only applies when the extinction takes place, whilst the obligation continues to be alternative; but if the obligation had become determinate to one of the things, as by the debtor's making an offer of payment, and placing the creditor *en demeure* to receive it; there can be no doubt but the obligation would become extinct, by the extinction of the thing so offered. *L. 105. (a) ff. de Verb. Oblig.*

[622] The extinction of obligations by the extinction of the thing due, cannot take place with regard to obligations of a sum of money, a certain quantity of corn, or wine, or to obligations of an indeterminate thing, as a cow or horse, not specifying any cow or horse in particular. - There cannot be in this case any extinction of the thing due, as there can be no extinction of what is indeterminate. *Genus nunquam perit*. Therefore, the 11th law of the code *si certum petat*, decides, that the debtor of a sum of money is not discharged, in consequence of his effects being destroyed by fire, *Incendium ære alieno non eximet debitorem*; for the money and other articles which have perished in the flames, are not the things which were due. It is a sum of money, which, not being determinate, cannot perish. But if the obligation, which was originally indeterminate, became determinate by an offer of the debtor to pay, and putting the creditor *en demeure* to receive it, there can be no doubt but that the obligation would be extinguished by the extinction of the particular thing so offered.

[623] Where the obligation is not absolutely indeterminate, and relates to a thing indeterminate in itself, but consti-

(a) *Stipulatus sum, Damam aut Erotem servum dari; cum Damam dares, ego, quominus acciperem, in mora fui: mortuus est Dama: an putes me ex stipulatu actionem habere? Respondit, secundum Massurii Sabini opinionem, puto te ex stipulatu agere non posse: nam is recte existimabat, si per debitorem mora non esset, quominus id, quod debebat, solveret, continuo eum debito liberari.*

tuting part of a determinate set of things, it is extinguished by the extinction of all those things.

For instance, if a person owes me one pipe of *the wine which he has in his cellar*, and there are a hundred pipes there, as long as any one remains, the obligation subsists; but if they are all destroyed, it is extinct.

This decision takes place where the terms of the obligation are restrictive, and confine the obligation to that set of things. It is otherwise, if the terms were merely demonstrative. For instance, if a person was obliged to furnish me a tun of wine, *to be taken from those in his vault (à prendre dans ceux de sa cave)*, though all the tuns in the vault of the debtor should perish by accident, the obligation would not be extinct; because it was not restrained to the tuns alone which were in the vault. The terms *to take* are not restrictive, they are only demonstrative, and only designate *unde solvetur*; they do not restrain the disposition, but only concern the execution of it (a).

A R T I C L E III.

What Extinctions of the Thing due extinguish the Debt; and in what Cases, and against what Persons, it continues, notwithstanding such Extinction.

[624] The extinction of the thing due extinguishes the debt, when the thing is wholly destroyed; if any part remains, the debt continues to subsist, so far as regards such part. For instance, if I was creditor of a flock of sheep, which had been sold or left to me, and there only remained one sheep, the others having died; or if I was creditor of a house which had been burnt, the debt of the flock would subsist, as to the remaining sheep; and in the same manner the debt of the house would subsist, as to the site and the materials that were saved.

[625] For the extinction of the thing due to extinguish the debt, it must happen without the act or fault of the debtor, and without his having been detained *en demeure*.

If the loss happens by the act of the debtor, it is evident that the obligation is not extinct, but is converted into an obligation of the value; for the debtor cannot by his own act discharge himself from his obligation, and deprive the creditor of his claim.

(a) If a person engaged to give me a dozen of wine, and to supply me with the best wine in his cellar, though he had no wine in his cellar, the obligation would not be void for want of an object; nor consequently, if all the wine in his cellar was used, would it become void by extinction.

This

This decision applies even where the debtor destroys the thing before he is apprized of the debt. *L. 91. (a) § 2. ff. de Verb. Oblig.*

[626] If the loss takes place not precisely by the act of the debtor, but in consequence of his default, for want of proper care, the debt is not extinct, but is converted in like manner into an obligation of the value.

What amounts to such default is differently estimated, according to the different nature of the contracts. *Supra, n. 142.*

[627] Lastly, the loss of the thing due does not extinguish the obligation, when it happens after the debtor is placed *en demeure* to give it. *L. 82. (b) § 1. ff. de Verb. Oblig.*

In order to prevent the obligation being extinguished by the extinction of the thing due, it is necessary, 1st, that the loss should take place during the continuance of the delay; for if the delay of the debtor had been purged, either by actual offers made by him to the creditor, by which he would have placed the creditor *en demeure* to receive what was due, or by a mutual agreement between the parties, the subsequent loss would put an end to the obligation. As the *demeure* of the debtor no longer subsists, it cannot have the effect of perpetuating the obligation, notwithstanding the extinction of the thing due. *L. 91. (c) § 3. de Verb. Oblig.*

2d, The loss must be such as would not equally have happened, if the thing had been delivered to the creditor when it was demanded. *L. 47. (d) § Fin. de Leg. 1. L. 24. (e) § 1. ff. de Pos. L. 12. (f) § 4. ff. ad Exhib. L. 15. (g) § Fin. ff. de Rei Vind.*

(a) De illo queritur, an & his, qui nesciens se debere occiderit, teneatur; quod Julianus putat in eo, qui cum nesciret a se peritum codicillis, ut restitueret, manumissit.

(b) Si post moram promissoris homo decesserit, tenetur nihilominus, proinde ac si homo viveret: & hic moram videtur fecisse, qui litigare maluit, quam restituere.

(c) Sequitur videre de eo, quod veteres constituerunt, quoties culpa intervenit, debitoris perpetuari obligationem, quemadmodum intelligendum sit. Et quidem si effecerit promissor, quominus solvere possit, expeditum intellectum habet constitutio; si vero morarius sit tantum, hæsitatur, an si postea in mora non fuerit extinguatur, superior mora? Et Celsus adolescens scribit, eum, qui moram fecit in solvendo Stichos, quem promiserat, posse emendare eam moram postea offerendo; esse enim hanc questionem de bono & æque, in quo genere *plerumque sub auctoritate juris scientiæ* (inquit) *erratur*. Et sane probabili hæc sententia est, quam quidem & Julianus sequitur; nam dum queritur de damno, & per utriusque causa sit, quare non potentior sit, qui tenet, quam qui persequitur.

(d) Item si fundus chasmate perierit, Labeo ait, utique estimationem non deberi; quod ita verum est, si non post moram factam id evenerit; potuit enim eum acceptum legatarius vendere.

(e) Reference incorrect.

(f) Si post judicium acceptum homo mortuus sit, quævis sine dolo malo, & culpa possessoris, tamen interdum tanti damnandus est, quanti actoris interfuerit per eum non effectum, quo minus tunc, cum judicium acciperetur, homo exhibetur; tanto magis si apparebit, eo casu mortuum esse, qui non incidisset, si tum exhibitus fuisset.

(g) Si servus petitus, vel animal aliud demortuum sit, sine dolo malo & culpa possessoris, pretium non esse præstandum plerique aiunt. Sed est verius, si forte distrahturus erat petitor, si accepisset, moram posse debere præstari; nam si ei restituisset, distraxisset, & pretium esset lucratus.

For the delay only perpetuates the debt after such expiration, in respect of damages; and if the creditor has not suffered any injury in consequence of the delay, no damages can be due for it. Now it is clear, that he does not suffer any damage, if the loss would have equally happened to himself.

It would be readily presumed, that the loss would not equally have happened, if the creditor was a dealer in such articles for the purpose of sale.

If the thing is consumed by fire, whilst it remains in the possession of the debtor, it is evident that it would not have been so lost, if it had been delivered to the creditor.

Where the restitution of a thing is demanded from those who have taken it by fraud or violence, no inquiry is made, whether it would equally have perished, if it had remained in the possession of the proper owner; for these persons are indiscriminately liable for the value of it, when it has perished in their possession. *L. (a) Fin. ff. de Cond. Furtiv. L. 19. (b) ff. de Vi & Arm. Quod ita receptum odio furti & violentiæ.* These persons are deemed *en demeure* from the first taking, and without any demand being necessary.

[629] When the thing due has perished by the act or fault of the principal debtor, or after he has been placed *en demeure*, the claim for the value of it subsists, not only against himself and his heirs, but also against his sureties; and, in general, against all who have acceded to his obligation. *L. 91. (c) § 4. and 5. ff. de Verb. Obl. L. 58. (d) § 1. ff. de Fid. L. 24. (e) § 1. ff. de Usur.* for which *Paul* assigns this reason, *Quia in totam causam sponderunt.* The sureties, by engaging on behalf of their principal

(a) Ante oblationem interemptæ rei furtivæ damnum ad surem pertinere, certissimi juris est.

(b) Merito *Julianus* respondit, si me de fundo vi dejeceris, in quo res moventes fuerunt, eum, mihi interdicto, unde vi restituere debeas, non solum possessionem soli, sed & ea, quæ ibi fuerunt; quanquam ego moram fecero, quo minus interdicto te convenirem; subtrahis tamen mortalitate servis aut pecoribus, aliisve rebus casu intercurrentibus, tuum [tamen] onus nihilominus in eis restituendis esse; quia ex ipso tempore delicti plus quam fructus debitor constitutus est.

(c) Nunc videamus, in quibus personis hæc constitutio locum habeat? quæ inspectio duplex est; ut, primo queramus, quæ personæ efficiant perpetuam obligationem; deinde quibus eam producant. Utique autem principalis debitor perpetuat obligationem. Accessiones, an perpetuent, dubium est. *Pomponio* perpetuari placet; quare enim facto suo fidejussor suam obligationem tollat? cujus sententia vera est. Itaque perpetuatur obligatio, tam ipsorum, quam successorum eorum. Accessionibus quoque suis, id est, fidejussoribus, perpetuant obligationem; quia in totam causam sponderunt.

An filius familias, qui jussu patris promisit, occidendo servum, producat patris obligationem, videndum est. *Pomponius* producere putat, scilicet, quasi accessionem intelligens eum, qui jubet.

(d) Cum facto suo reus principalis obligationem perpetuat, etiam fidejussoris durat obligatio; veluti si moram fecit in *Sticho* solvendo, & is decessit.

(e) Cum reus moram facit, & fidejussor tenetur.

for a particular thing to be given, are deemed to have engaged likewise for the performance of all the secondary obligations derived from the principal obligation, such as that of keeping the thing with the proper care, until it is delivered, and generally for the application of all the integrity and fidelity which are incident to the accomplishment of the principal obligation. They cannot, therefore, be liberated from their obligation, by the mere loss of the thing due, when that loss occurs in consequence of the default of the principal debtor, or after his delay. Having, as we have said, engaged as sureties for the application of that care which ought to be applied by their principal, in the preservation of the thing engaged to be given, and for the fidelity which is due from him, in the accomplishment of the obligation, they are responsible for the neglect by which the debtor has suffered the thing to be lost, and for the unwarrantable delay by which he has contravened the faithful performance of his obligation.

These principles seem contrary to the rule *unicuique mora nocet*, L. 173. (a) § 2. ff. de Reg. Jur. for from this rule it might seem to follow, that the delay of the principal debtor should only prejudice himself, and not his sureties. Cujas, and other interpreters, reconcile the rule with the principle by this distinction. The delay of the principal debtor cannot affect his sureties, so as to enhance their obligation, *non nocet ad augendam obligationem*. For instance, in regard to debts of a sum of money, the delay of the debtor cannot charge his sureties, who have only engaged for a certain definite sum, so as to make them liable (b) for interest due by the debtor, from the day of his being placed *en demeure*; for the delay of the debtor does not affect the sureties *ad augendam eorum obligationem*: therefore, it cannot oblige the sureties to pay interest, who are only obliged for the principal sum. This is the case of law 173; but in debts of a specific thing, the delay of the debtor may affect the sureties, whose engagement is unlimited, so as to perpetuate their obligation, and prevent their being liberated by any loss which may happen during the continuance of the delay. *Non nocet ad augendam obligationem sed nocet ad perpetuandam*.

[630] *Contra, vice versa*, if the thing has perished by the act or fault of the surety, or after he has been placed *en demeure*, the surety alone will be liable for the value of it; the prin-

(a) *Unicuique sua mora nocet, quod et in duobus reis promittendi observatur.*

(b) May it not be observed, that the meaning of the rule is to impose and not to restrain, or limit an obligation, that it imports positively, that a person chargeable with delay shall be himself liable to the consequences, without including or referring to the negative proposition, that no other person shall be liable, upon the same contingency, to the claim of the party interested in objecting to the delay; there is nothing in the rule equivalent to the words *tantum*, or *soli*.

principal debtor will be liberated by its extinction; *L. 32. (a) § Fin. ff. de Usur. L. 49 (b). ff. de Verb. Oblig.* The reason of the difference is, that the surety is in truth obliged for the principal debtor; but the principal debtor is not obliged for the surety, and consequently, he cannot be bound by the obligation which the surety has contracted by his act, neglect, or delay.

[631] If the thing due is lost by the act or fault of one of the co-debtors in solido, or after he is placed *en demeure*, the other co-debtors are liable. *L. 18. (c) ff. de duobus reis. Vid. supra, n. 273.*

[632] If the thing is lost by act or fault of one of the heirs of the debtor, or after his *demeure*, his co-heirs will not be liable. *L. 48. (d) § 1. ff. de Leg. 1.*; for, although as possessors of the goods, they are subject to an hypothecation for the whole of the debt, they are not individually and personally debtors for more than their respective portions; they are not personally debtors in solido, nor liable one for another.

[633] The principle which has been established, that the debtor of a specific thing is discharged from his obligation, when the thing is lost, without any act, default or delay, on his part, is subject to an exception, when he has, by a particular clause in the contract, expressly taken the risk of such loss upon himself. For instance, if I give a precious stone to a lapidary, to polish, and it is broken, without any fault on his part, and in consequence of some intrinsic defect; although regularly this loss, which takes place without any blame of his, and by mere accident, discharges him from the obligation of restoring the stone entire, nevertheless, if he had particularly engaged to take that risk upon himself, he would be bound to pay me the value. *L. 13. (e) § 5. ff. Locat.* These agreements, by which a debtor charges himself with casualties, have nothing contrary to the equality which ought to be maintained in contracts, especially where the person under-

(a) Item si fidejussor solus moram fecerit, non tenetur; sicuti si Stichum promissum occiderit; sed utilis actio in hunc dabitur.

(b) Cum filius familias Stichum dari sponderit, & cum per eum staret, quominus daret, decessit Stichus; datur in patrem de peculio actio, quatenus maneret filius ex stipulatu obligatus. At si pater in mora fuit, non tenebitur filius, sed utilis actio in patrem danda est. Quæ omnia & in fidejussoris persona dicuntur.

(c) Ex duobus reis ejusdem Stichi promittendi factis, alterius factum alteri quoque nocet.

(d) Si unus ex heredibus servum legatum occidisset, omnino mihi non placet coherentem teneri, cujus culpa factum non sit, ne res in rerum natura sit.

(e) Si gemma includenda aut insculpenda data sit, eaque fracta sit, si quidem vitio materie factum sit, non erit ex locato actio, si imperitia facientis, erit. Huius sententia addendum est, nisi periculum quoque in se artifex receperat; tunc enim, etsi vitio materie sit evenit, erit ex locato actio.

taking the risk receives an equivalent. For instance, in the case supposed, the lapidary, who has taken the risk upon himself, would be deemed to have contracted for a greater price upon his work, than if he had not done so.

So in case of a loan of things to be restored in specie (*commodatum*), if the borrower undertakes to answer for any loss which may casually take place, as in the case mentioned, *L. 1. (a) Cod. Commod.* he is deemed to have a compensation for his risk, by the engagement, if the things lent, which the lender was under no obligation of assisting him with gratuitously, and which might have been let out for a reward.

In case of pledges, the creditor who takes upon himself the risk of the article pledged, as in *L. 6. (b) Cod. de Pign. Act.* is indemnified by the security which he acquires, and which his debtor, who had not engaged to find him security, was not obliged to procure him.

Even where the debtor receives nothing for the risk which he undertakes, if he intends therein to exercise an act of liberality towards the other party, there is nothing unfair in the engagement. On the other hand, if the debtor has no such intention, but meaning to receive an equivalent, charges himself with risks, the agreement is unjust in point of conscience, if he does not receive an equivalent adequate to the risk. In point of law, such an equivalent is presumed.

A debtor may charge himself not only with risks of a particular kind, as in *L. 13. (c) § 5. ff. Locat.* he may charge himself generally with all risks, by which the things may be lost. *L. 6. (d) Cod. de Pign. Act.* But however general the undertaking may be, it includes only such risks as might have been foreseen, and not those which there could be no room to apprehend (*e*). *Arg. L. 9. (f) § 1. ff. de Transact.* Gauthier, *Tract. de Contract. sur.* § 24. thinks that this decision should hold, even if the clause was expressed in these

(a) Ea quidem, quæ vi majore auferuntur, detrimento eorum, quibus res commodantur, imputari non solent. Sed cum is, qui à te commodari sibi bovem postulabat, hostilis incursionis contemplatione periculum amissioni, ac fortunam futuri damni in se suscepisse proponatur. Præses provinciae, si probaveris eum indemnitatem tibi promississe, placitum conventionis implere eum compellet.

(b) Quæ fortuitis casibus accidunt, cum prævideri non potuerint (in quibus etiam aggressura latronum est) nullo bonæ fidei judicio præstantur: & ideo creditor pignora, quæ hujusmodi casu interierint, præstare non compellitur; nec a petitione debiti submovetur; nisi inter contrahentes placuerit, ut amisso pignorum liberet debitorem.

(c) See *supra*, *hac numero*.

(d) See *supra*, law just quoted.

(e) I think it is clear, that the law of *England* would adopt the opposite rule.

(f) *Transactio*, quæcunque sit, de his tantum, de quibus inter convenientes placuit, interposita creditur.

terms, "Charges himself with all accidents whether foreseen or not." See our *Treatise of the Contract of Hiring*. Part III. Ch. I. Art. II. § 5. where we have treated at length of all these clauses.

A R T I C L E IV.

Whether an Obligation, extinguished by the Extinction of the Thing due, is so far destroyed as not to subsist with regard to any Part of the Thing which may remain, or with regard to the Rights and Actions belonging to the Debtor in reference thereto.

[634] Where the extinction of the thing due is not total, and some part of the thing remains, the obligation beyond a doubt subsists as to such residue. Thus if you was my debtor of a particular flock of sheep, which should all die but one, or of a house which was destroyed by lightning, it is clear that you would be my debtor of the remaining sheep, or of the scite and the remaining materials of the house. For although that one sheep could not constitute a flock, it is nevertheless, according to the strictest propriety of expression, a part of the flock, as the scite and materials are also a part of the house. It may be said then in these cases, that the flock which was due to me still subsists, not totally, but in part, and in respect of the one surviving sheep; and also that the house subsists in part by the continuance of the scite and materials, and such remaining part may yet be the subject of an obligation.

There is more difficulty in the case of such a total extinction of the thing due, that what remains cannot be regarded as a part of such thing. This is the case where the obligation relates to one individual thing, as an animal.

It is a question, whether the obligation continues in respect to what may remain thereof? For instance, if you are my debtor of a particular cow, and the cow dies without your fault, have I a right to demand the hide?

The reason (a) for doubting is, that the death of the cow induces a total extinction of the thing due; it cannot be said, that the cow in part subsists; the hide is indeed part of the cow, but still it cannot be properly said to be part of the living cow which was due to me. There being a total extinction of the thing due, it may be said that the obligation itself is totally extinct, and that I cannot demand any thing, not even the hide, for that is not the cow which you had engaged to give me. There was nothing in contemplation

(a) It seems difficult to suppose that in this case any doubt could be seriously entertained. The ground of the question appears merely a play upon words.

between us respecting the hide, which might remain after the animal's death; you have not engaged to give me that, that is not what is due to me, consequently I have no right to demand it. It is supposed that *L. 49. ff. de Legat. 2.* decides this question, *Mortuo bove, qui legatus est, neque corium neque caro debetur.* Notwithstanding these reasons, I think that the creditor would be well founded, even in this case, in demanding what remained: 1st, Justice pleads in favour of this decision. In effect when the cow, which I have bought and paid for, dies without your fault before delivery, would it not be a manifest injustice, that you should derive an advantage from the loss which I sustain in consequence of the death, by retaining for your profit, and to my prejudice, the hide of the animal which you owed to me? 2d, the principles of law also establish this decision. It is indisputable, that in whatever manner my property may perish, any part of it which remains still belongs to me, *meum est quod ex re mea supereft*, *L. 49. ff. de Rei Vend.* Now if the *jus in re*, the right which I have in a thing, such as the dominion or right of property, continues after the extinction of that thing, to subsist as to what remains of it, why should not the *jus ad rem*, or the right in respect of that thing, the claim which I have for the thing to be given to me, equally continue with respect to such residue, to subsist after extinction of the thing? Upon the same principle that *meum est quod ex re mea supereft*, it is to be inferred that *mibi debetur quod ex re mihi debita supereft*. This is justly decided by *Brunus* in his *Treatise de Interitu*; after having established that *forma dat esse rei*, and that *deducta forma substantiali, res interiisse videtur*, he says, *perempta forma si quid ex re supereft, potest durare circa illud quod remanet jus, actio, et obligatio.*

It will be easy to answer the reasons in support of the opposite argument. It is said, the total extinction of the thing due entirely extinguishes the debt; and consequently, the creditor can have no right to demand the residue. The answer is, that when the extinction is so absolutely total, that nothing at all remains, it is freely agreed that the obligation is wholly extinct; but where the extinction is not so entire but that something remains, although not properly a part of the thing due, I deny that such an extinction is fully and perfectly a total extinction of the thing, such as ought totally to extinguish the obligation, I contend ought to subsist with respect to such residue. It is false reasoning, and a *petitio principii*, to advance the contrary as a principle, since that is precisely the point in question. Lastly, it is said, that the debtor engaged to give the beast which was living at the time of the contract, and not the skin after the animal was dead. The answer is, he did not *formaliter* engage

engage to give the skin, but he engaged to do so *implicite et eminenter*; an obligation to give any thing includes *eminenter*, all that the thing comprizes, and contains, and consequently all that remains after the extinction of the thing itself. With respect to the law 49. (a) *ff. de Leg. 2.* which is opposed to this reasoning, and which says, that when an animal given as a legacy is dead, the legatee has no right to demand either the skin or the flesh; the answer is, that it must be necessarily implied that in the case supposed, the death must be understood as taking place before the legacy attached; that is, in the life-time of the testator, if the legacy was absolute, or before the accomplishment, if the condition of it was conditional, for if the death had happened after the legacy had attached, and property had thereby vested in the legatee, there can be no doubt that all that remained would belong to him, conformably to the rule, *meum est quod ex re mea superest, ideo vindicari potest*, L. 49. § 1. *ff. de Rei Vind.* Now supposing, as we necessarily must, that the animal had died before the legacy vested, no conclusion can be drawn from that law, repugnant to our decision: for, if it is established by that law, that the legatee cannot demand the residue, the reason is, not that by the death of the animal the debt is extinct, for the death having taken place before the right to the legacy attached, the debt could never have been contracted; but that it was impossible that the legacy could take effect, as the death of the testator could not confirm the legacy of a thing not in existence.

The obligation also subsists after the extinction of the thing due, in respect of any thing accessory to it. Thus, you were my debtor of a particular horse with his equipments, and the horse afterwards died without any fault in you, I should still have a claim upon you for the equipments. The law 2. *ff. de Pecul. Leg.* is not repugnant to this decision. It is said, *que accessionum locum obtinent, extinguuntur, cum principales res peremptæ fuerint*. The answer is, that this rule takes place whilst there is no obligation as yet contracted. The law refers to a slave, who being given as a legacy together with his peculium, dies before the legacy vests. The peculium not being given *per se*, but only as being accessory to the slave, and the legacy of the slave not having any effect, the whole falls to the ground. In this case, no obligation has been fully contracted. But where an obligation has been contracted of any particular thing, with its accessories the creditor having acquired a right, *jus ad rem*, with respect to the accessories, as well as with respect to the principal subject, this right ought to be preserved, even after the extinction of the principal subject.

(a) See *supra* in the text.

[635] Where the thing which was due is destroyed, without the fault of the debtor, or is prevented from being the object of a contract, or is lost so that it cannot be known where it is, if the debtor has any rights or actions in respect to it, his obligation subsists so far as to entitle the creditor to the benefit of these rights and actions. For instance, if you were my debtor of a horse, which, without any fault on your part, was killed by a third person, or wrongfully taken away, and disposed of, without its being known what had become of him, you would be discharged from your obligation of the horse, but you would be obliged to let me have the benefit of your right of action, against the person who had killed, or taken him. Also, if you were my debtor of a piece of land, which was taken for some public purpose, you would be discharged as to the land, but would be obliged to subrogate to me your right of compensation. These rights being for my benefit, must be pursued at my expence.

C H A P. VII.

Of several other Ways in which Obligations are extinguished.

A R T I C L E I.

Of Time.

[635] Regularly, lapse of time does not extinguish obligations : persons who enter into an obligation oblige themselves and their heirs, until the obligation is perfectly accomplished.

But there may be a valid agreement, that an obligation shall only continue to a certain time. For instance, I may become surety for a person upon condition, that my undertaking shall not bind me after the expiration of three years. By the *Roman* law, an agreement, by which the debtor agreed that he should only be obliged for a certain time, or until the occurrence of a certain condition, although valid, did not, at the expiration of the time, or upon the accomplishment of the condition, *pleno jure* extinguish a debt, but only gave the debtor an exception or *fin de non recevoir* against the demand of the creditor, *exceptionem pacti*, L. 44. § 1. ff. de Obl. & Act. L. 56. ff. de verb. Obl. § 4. The reason which the jurists give for this, is that obligations once contracted, can only be extinguished in certain particular manners, in which the lapse of time and the accomplishment of a condition are not included.

The *French* law does not admit of these subtleties, and we hold

the debt to be acquitted *pleno jure*, by the expiration of the time, during which alone the debtor consented to remain obliged.

If the person, who is only bound for a limited time, is regularly proceeded against in a Court of Justice within that time, his obligation is perpetuated, and he will only be liberated by payment: for his own unjust delay ought not to procure a benefit to himself, to the detriment of his creditor. This is conformable to the rule of law; "*omnes actiones, quæ morte, aut tempore pereunt, semel incluse judicio, salve permanent.*" L. 139. de Reg. Juris.

In instruments which import that one of the contracting parties shall only be bound for a certain time, it is very necessary to attend to the true intention of that condition. For instance, if *Peter* borrows a hundred pounds from you, to be returned on demand, and it is agreed that I shall be his surety for three years only; it is evident that the meaning of that agreement is, that unless a suit is instituted against me within three years, I shall be entirely discharged, for there can be no other meaning. But if you make a lease for six years, and I become surety for the rent with a clause, that I should be bound for six years only, that would not imply that at the end of six years I should be discharged from my engagement, though the arrears had not been paid. But the construction should be, that out of caution, and though no such explanation was really necessary, I chose to declare that my engagement should be confined to the tenancy of six years, and not to any fresh contract that the tenant might make with you, after the expiration of that time, whether expressly or by tacit renewal.

A R T I C L E II.

Of Resolutive Conditions.

[636] Upon the same principles which admit, that a person may contract an obligation which shall only continue a certain time, he may also contract an obligation which shall only continue until the occurrence of a certain condition. As for instance, in becoming surety for any one, I may declare that my engagement shall only continue until the arrival of a certain vessel, upon which he has a bottomry, and my obligation becomes extinct upon the arrival of that vessel. This is called a resolutive condition, respecting which *vide supra*, Part II. Ch. 3. Art. II.

In mutual contracts, which contain reciprocal engagements between each of the contracting parties, the omission of one side to execute his part, is often made a condition resolutive of the obligation of the other.

For

For instance, if I sell you my wine upon condition, that unless you remove it within eight days I shall be discharged : this is a resolutory condition.

The mere lapse of the time within which you were to satisfy the condition, in this and similar cases, would alone, according to the simplicity of natural principles, be sufficient to extinguish and dissolve my engagement. But, according to the usages in *France*, the creditor is summoned by an officer to perform the condition, or to appear before the judge who will declare the engagement to be void, in default of his doing so.

Even if it is not expressed in the agreement, that the non-performance of your engagement shall be a condition resolutory of mine, such non-performance will, in many cases, amount to a rescission of the bargain, and consequently to an extinguishment of my obligation. But it is necessary for this purpose, that I should have rescission pronounced by the judge upon an assignation to you for the purpose. Suppose for instance, I have sold you my library purely and simply ; if you delay paying me the price of it, the non-performance of your engagement will justify the non-performance of mine : but this extinction of my engagement does not take place *pleno jure* ; it takes place by the sentence of the judge, upon an assignation for you to take away the library, and pay me the price of it, or for the agreement to be declared void : in this case, it is at the discretion of the judge, to give you such time for performing your obligation as he shall think proper ; and when that time is expired, I may obtain a sentence for the rescission of the sale, discharging me from my engagement (a).

A R T I C L E III.

Of the Death of the Creditor and of the Debtor.

§ I. *General Rules.*

[637] Regularly, a claim is not extinguished by the death of the creditor ; for a person is supposed to stipulate as well for himself as for his heirs, and other universal successors.

Therefore, by the death of the creditor, the claim passes to the persons of his heirs, who succeed to all his rights (b) ; and if he has
no

(a) See Vol. I. Appendix, No. XI.

(b) Accordingly it has been determined, that a covenant to make a lease for years to a man and his assigns, imported an obligation to make a lease to his executors ; the covenantee having died before the time appointed for making the lease, *Plowden*, 284. Upon the same principle, where a condition of a bond was to settle certain lands in such a manner,
by

no heirs, it is deemed to vest in the vacant succession, which, in this respect, *persona vicem sustinent defuncti*.

In like manner, the obligation is not extinguished by the death of the debtor: for we are deemed to engage as well for ourselves, as for our heirs, and other universal successors. Therefore, when the debtor dies, the obligation passes to his heirs, who succeed to all his rights and obligations, (*droits tant actifs que passifs*); and if he leave no heirs, it falls upon the vacant succession which represents him.

The principle, that obligations pass to the heirs of the debtor, and that the right which results therefrom passes to the heirs of the creditor, holds good not only with regard to obligations which consist in giving, but also with regard to those for doing any thing, according to the constitution of *Justinian* in the law (a) 15. *Cod. de Cont. et Com. Stip.*

§ II. Of Claims which are extinguished by the Death of the Creditor.

[638] There are, however, certain claims which are extinguished by the death of the creditor, such as those which have for their object something personal to himself; as if a person obliges himself to allow me the use of a certain book whenever I should require it, or to accompany me in my journies, the object of my claim being personal to myself, the claim will be extinguished by my death.

But if I had obtained a judgment for damages against my debtor, for the non-performance of his obligation; this claim of the damages, into which my original claim would be converted, would pass to my heirs (b).

A claim for the reparation of injuries is also extinguished by the death of the creditor or person injured, if, during his life-time, he has not made any complaint or demand in a Court of Justice; he

by such a day, and the obligor died before the day, so that the bond was saved at law, by the act of God: the Lord Chancellor, notwithstanding, decreed the lands to be settled, and so it has been often done. *Holtam v. Ryland*, 1 *Eq. Ab.* 18. *Powell*, *Cont.* 450.

(a) Si quis sponderit insulam, cum moriebatur, edificare stipulatori, impossibilis veteribus videbatur hujusmodi stipulatio; sed nobis sensum contrahentium discutientibus, verisimile esse videtur hoc inter eos actum, ut incipiat quidem contra morientem obligatio, imminet autem heredibus ejus, donec ad effectum perducatur. Nemo enim ita stultus invenitur, ut tali animo faceret stipulationem, ut putaret posse tantum edificium in uno momento horæ extollere: vel eum, qui moritur, talem habere sensum, quod ipse sufficeret ad hujus operis completionem.

(b) Even without any judgment by the creditor, his representatives might, I conceive, sustain an action for the non-performance in his life-time, of an agreement personal to himself.

is presumed in this case to have forgiven and pardoned the injury,
L. 3. (a) ff. de Injur. (b)

Annuities for the life of the creditor are extinguished by his death; but arrears due to the time of his death pass to his heirs.

§ III. *Of Claims which are extinguished by the Death of the Debtor (c).*

[639] There are also some debts which are extinguished by the death of the debtor. Such are those which have for their object some personal act of the debtor himself; as if a man engages to serve me as a shepherd, or in any other capacity (*d*).

If the debtor, for non-performance of such an obligation, is condemned in damages, this obligation, which succeeds to his principal and original obligation, devolves upon his representatives (*e*).

In other cases than those of personal acts, a person who engages for the performance of any act, and dies before it is performed,

(*a*) *Injuriarum actio neque heredi neque in heredem datur.*

(*b*) In the law of *England*, there are some distinctions upon this point; the following summary by Mr. *Toller*, will suffice for the present purpose.

“ In general, an executor has a right to a compensation, whenever the testator’s personal estate has been damaged, and the wrong remains unredressed at the time of his death. But an executor has no right of action for an injury done to the person of the testator, nor to his freehold, as for felling trees, or for cutting the grass.”

I conceive it is a fair result from this distinction that an injury, founded upon any relative character, such as that of master and servant, is not extinguished by the death of the testator, the benefits arising from such relation, being in some degree a matter of property; this observation, if applied to the seduction of a daughter, where the injury to parental feeling is the principal object of regard, may appear extravagant, but the enticing away a confidential clerk in an extensive business is principally injurious, as it affects the property, and there is no line of distinction.

By *Stat. 17. Charles II. Ch. 8.* if a person dies after obtaining a verdict, the suit continues so as entitle his executors to the benefit of the judgment; and the statute does not seem to make any difference in regard to the foundation of the action, or to induce any exception of mere personal injuries.

If the party is alive on the first day of the assizes, as the whole period of the assizes is for this purpose regarded as one instant, his death taking place before the trial is not material. 1 *Salk.* 8.

(*c*) See Appendix to Part I. Ch. 1. § 1. Art. V. No. IV.

(*d*) *Calcraft* covenanted to pay to *Cook*, and his executors, 8*s.* a week, during the life of *Cook* and his wife; and *Cook* covenanted that he would not at any time deal in magazines and periodical pamphlets. *Cook*’s widow and administratrix brought an action for the weekly payments, and *Calcraft* pleaded that she had dealt in magazines, by which he had lost the benefit of agreement. The Court were of opinion that this was no answer; for it appeared by the agreement that the covenant by *Cook* was only a restriction laid on himself, and must expire with his life. 3 *Wils.* 380.

(*e*) If the right of action has attached in the life of the person contracting the engagement, I conceive it will be a sufficient foundation for a claim against his representatives; but I cannot adduce any authority in support of this opinion, which is founded solely on the general nature of the subject.

although

although he has not yet been put *en demeure* to do it, transmits the obligation to his heirs.

By the *Roman* law, obligations arising from offences were for the most part extinguished by the death of the debtor, (or person committing the injury,) unless the demand had been brought into judgment in his life-time; they did not affect his heirs, except perhaps to the extent of the benefit which they derived therefrom, in the succession of the deceased.

The action called *condictio furtiva*, for the repetition of property stolen, was alone maintainable against the heir, although he did not derive any benefit from it. *L. 9. ff. de Cond. Furt.*

The principles of the canon law were different. It was only the penalty attached to the offence which was extinguished by the death of the person committing it; but the obligation of repairing the injury which a person had wrongfully committed fell upon his heirs. This is the decision of *Cap. Fin. de Sepult.* and *Cap. 5. X. de Rapt.* The *French* law has, in this respect, preferred the principles of the canon law, as being more equitable than those of the *Roman* law; and according to the practice of the courts, although the heirs of the person who committed the injury, have not derived any advantage from it, they are answerable for the damages even though no action had been commenced against the deceased. This is attested by *J. Fab.* upon the *Inst. tit. de Act. § Penales*, and *d'Argentré* upon the Art. 189, of the *Coutume of Brittany* (a.)

CHAP.

(a) The common maxim of the *English* law is, that, *actio personalis moritur cum persona*, but this is not generally, much less universally true.

The extent and application of it was considered by Lord *Mansfield*, in the case of *Hambly v. Trott*, *Cowp.* 371. in which it was decided that an action of trover could not be maintained against an administrator, for a conversion by his intestate. In the course of his argument, he cited a case in which a person had cut down timber belonging to the queen; and, upon an information against his widow after his decease, *Manswood* Justice said, "In every case where any price or value is set upon the thing, on which the offence was committed, if the defendant dies, his executor shall be chargeable; but where the action is for damages only, in satisfaction of the injury done, then his executor shall not be liable." Here, therefore, (said Lord *Mansfield*,) "is a fundamental distinction; if it is a sort of injury, by which the offender acquires no gain to himself, at the expence of the sufferer, as by beating or imprisoning a man, there the person injured has only a reparation for the delictum in damages, to be assessed by a jury. But where, besides the crime, property is acquired, which benefits the testator, there the action for the value of the property shall survive against the executors. As for instance, the executor shall not be chargeable for the injury done by his testator, in cutting down another man's trees, but for the benefit arising to his testator, for the value or sale of the trees, he shall; so far as the tort itself goes, an executor shall not be liable, and therefore it is that all public and private crimes die with the offender. And the executor is not chargeable, but so far as the act of the offender is beneficial, his assets ought to be answerable, and his executor therefore should be charged. So far as the cause of action does not arise *ex delicto* or *ex maleficio* of the testator, but is founded in a duty which the testator owes the plaintiff, upon principles of civil obligation, another form of action may be brought, as an action for money had and received."

C H A P. VIII.

Of Bars and Prescriptions.

ARTICLE I.

General Principles of Legal Bars, and the Nature of Prescriptions.

[640] The legal bars to the maintenance of a claim, (*fins de non recevoir contre les creances,*) are certain causes which prevent the creditor from enforcing such claim in a court of justice.

The first kind of *fin de non recevoir*, is the authority of a legal adjudication, when the debtor has been judicially discharged from the claim of his creditor; there results from this judgment a bar (*fin de non recevoir*) against the creditor, which renders him incapable of pursuing his claim, unless he invalidates the sentence upon an appeal, or otherwise procures it to be rescinded by the regular course of law. This is the bar which is called in law, *exceptio rei judicate*, as to which see the Digest, *tit. de Except. rei jud.* See also Part IV. c. 3. § 3. *post*.

A second bar is that, which results from the decisory oath of the debtor, who has sworn that he does not owe any thing, upon such oath having been deferred to him by the creditor. There results from this oath, a bar called *exceptio jurisjurandi*, which renders the creditor inadmissible to prosecute his claim, whatever proof he may afterwards have in support of it; we shall treat of this oath *infra*, Part IV. Ch. 3. § 3. Art. I.

[641] A third *fin de non recevoir* is that, which results from the lapse of the time to which the law has limited the action arising from the claim. This *fin de non recevoir* is more

The principle above laid down, that "so far as the act of the offender is beneficial, his assents ought to be answerable, and his executor shall be charged," must not be indiscriminately assented to. Where a person takes my property and sells it, I may elect to waive the wrong, and treat the act as an agency, giving me a right to demand the money actually received; but if there is no sale, it is a mere wrong, and can only be treated as such, however beneficial to the wrong doer. With all the latitude which has been given to the action, for money had and received, in order to effectuate the purposes of moral justice, it cannot be supposed that such an action would be maintainable against a person digging stones from a quarry, and therewith building a house; and if the action could only be sustained against the party himself, as for a wrong, it is impossible to maintain that the accident of his death would induce a new right of action against his executors, as founded on a contract.

The statute before alluded to, of 17 Ch. II. c. 8. provides, that in all actions the death of either party, between verdict and judgment, shall not be alleged for error in any action whatever.

particularly called a prescription, although prescription is a general term which may also be applied to all other *fins de non recevoir*.

It is of this kind of *fin de non recevoir*, that we shall treat in the present chapter.

[642] *Fins de non recevoir* do not extinguish the claim, but they render it inefficacious, by depriving the-creditor of his actions to enforce it.

And further, although *fins de non recevoir* do not *in rei veritate* extinguish the claim, they induce, so long as they subsist, a presumption that it is extinguished and discharged.

Therefore, when my debtor has acquired a *fin de non recevoir* against my claim, I am not only disabled from maintaining an action against him, I cannot even oppose such claim by way of compensation, against any claims which he may have acquired against me, after the *fin de non recevoir* has attached; for the *fin de non recevoir*, which subsists against my claim, is a presumption of its being extinguished.

But if a person who owed me a sum of money, became my creditor of an equal sum, before the time necessary to induce a prescription had elapsed, and consequently before the bar had taken place, and afterwards, when the time of prescription upon my demand had become complete, he insisted upon payment of his, although I could not set up my own as a ground of action, I might avail myself of it by way of compensation. This is an instance of the maxim which prevails in the schools: *Que temporalia sunt ad agendum, perpetua sunt ad excipiendum*.

The reason is, that as compensation operates *pleno jure, supra, n. 599*, the instant that you become my creditor, your demand and mine which was not then barred by prescription, are mutually compensated and extinguished.

Upon the same principle that such a bar, as long as it subsists, induces a presumption that the claim is extinct, it is nugatory to become surety for a claim that is so barred. Besides, the same exception *in rem*, which may be opposed against the principal demand by the debtor, may also be opposed by the surety (a).

A bar must be opposed by the debtor; it is not supplied by the judge.

It may be waived by a renunciation of the debtor, either express or tacit.

A bar which is thus waived, can be no longer opposed to the prosecution of the claim. There is no way of waiving it more effec-

(a) This relates to the accessorial obligation of sureties, which has been stated at length in a former chapter, and which absolutely requires the subsistence of a valid principal obligation; it does militate against an original obligation, for the performance of an act previously incumbent on another, who has acquired the benefit of a prescription.

tually than the payment of the debt ; for as the bar has not extinguished the debt, there can be no doubt but that the payment is valid. Nevertheless, if the debtor who paid the debt was a minor, he might obtain restitution against such payment in the same manner as against any another renunciation.

A R T I C L E II.

Of Prescriptions of thirty Years.

[643] Regularly, an action upon any claim ought to be instituted within the term of thirty years: when the creditor has let this term elapse without commencing his action, the debtor acquires a prescription, which may be opposed to the demand.

§ I. *The Reasons upon which it is founded.*

[644] This prescription is founded, 1st, Upon a presumption of a payment, or release arising from the length of time ; as it is not common for a creditor to wait so long, without enforcing payment of what is due, and as presumptions are founded upon the ordinary course of things, *ex eo quod plerumque fit. Cujas in parat. ad tit. de Prob.* ; the laws have formed the presumption, that the debt was acquitted or released.

Besides, a debtor ought not to be obliged to take care for ever of the acquittances, which prove a demand to be satisfied ; and it is proper to limit a time beyond which he shall not be under the necessity of producing them.

2d, It is also established as a punishment for the negligence of the creditor. The law having allowed him a time to institute his action, the claim ought not to be received, when he has suffered that time to elapse.

§ II. *When and against whom it runs.*

[645] It follows from what has been said, that prescription only begins to run from the time when the creditor has a right to institute his demand, because no delay can be imputed to him before that time. Hence it is a general maxim, with regard to this subject, *contra non valentem agere nulla currit prescriptio* ; consequently a prescription cannot begin to run, whilst the debt is suspended by a condition.

If there is any time of credit allowed, although the right of the creditor is already perfect, the prescription does not begin until that time has expired, because the creditor cannot previously sue with effect.

When a debt is payable at several terms, I see no inconvenience in holding, that the time of prescription begins to run from the expiration of the first term, for the part then payable, and for the other parts only from the day of expiration of the respective terms of payment. For instance, if you owed me 3000 livres, payable by three yearly instalments, the first payment to be made on the 1st *January* 1735, the prescriptions for one third of the debt would begin to run from the 1st *January* 1735; for the second, from the 1st *January* 1736; for the remaining third, from the 1st *January* 1737; and the debt will be prescribed, for the first, in 1765; for, the second, in 1766, and for the last, in 1767.

[646] From our principle, that the time of prescription does not begin to run, until such time as the creditor is enabled to prosecute his demand, it follows, that it cannot run against the claims which a woman, even with a separate property, has against her husband, so long as the marriage continues; for being under his power, she is prevented from proceeding against him.

It is the same with respect to claims and actions which she has against third persons, if such third persons have recourse over against her husband; for in this case the wife is supposed to have been prevented from proceeding by her husband, whose interest it was to do so, on account of the recourse which the debtor had against him.

A prescription cannot run against a beneficiary heir (a), for the claims which he has against the beneficiary succession; for he cannot proceed against himself.

[647] Prescription does not run against minors, although they have a tutor: this exception is not founded upon the rule, *contra non valentem agere, non currit prescriptio*, since they have a tutor who may sue for them, but upon a particular indulgence to the infirmity of their age. The customs of *Paris* and *Orleans* have dispositions for this purpose; they except minors from the law of prescription, by saying that it runs *inter majores*.

If the creditor leaves several heirs, some of whom are of full age, and others minors; and the object of the claim is something divisible, *natura, aut saltem intellectu*, as if it is the claim of a certain estate; the time of prescription, which will not run against the minors

(a) An heir who is only subject to accounting for the amount actually received, and is not, like heirs in general, subject to all the debts of the deceased.

for their parts, will not be thereby prevented from running against those of full age.

But if the right is indivisible; as if I promise a person to grant a servitude for the benefit of his house, the prescription will not, so long as any of his heirs are minors, run even against the others, because the claim being indivisible, and not susceptible of parts, cannot be barred in part: it is in this case that the minor is said to aid the major *in individuïs*.

[648] It is a question, whether prescription runs against persons not having the use of reason? These persons either have the benefit of curators, or they have not. In the latter case, they fall within the rule *contra non valentem agere*, &c., and it is clear that no prescription can run against them. The question then is confined to such as have curators. It may be urged in their favour, that minors are excepted from the law of prescription, though provided with tutors, and these persons are usually compared to minors, and are still more incapable of attending to their affairs, and therefore their situation requires compassion, and the protection of the law; and consequently it appears that the exception granted to infants should be extended to them. *Catelan*, T. 11. l. vii. 13. reports an *arret* of his parliament by which it was so decided.

The reasons which may be adduced in support of the opposite opinion are, that the laws, by granting minors an exception from the effects of prescription, grant them a privilege; and the nature of privileges granted to particular persons is, that they are not to be extended to others, even under the pretext of a parity of reason. It may be even said, that there is not an entire parity of reason. The law might more readily except from the rules of prescription the time of minority, because it has certain limits; whereas insanity usually continues during life, and may last a hundred years; and the prescription, which is so necessary for general tranquillity, would be interrupted for a very considerable time, if persons destitute of reason were excepted. Besides, as minors are the hope of the state, there is a reason for assisting them which does not apply to other persons: this opinion may be supported by the authority of the gloss in Ch. 13. *Extra. de Presc.* which, in enumerating those against whom prescription does not run, does not include persons of an insane mind. *Bretonnier sur Henrys*, t. 2. 4. 21. seems inclined to this opinion.

[649] When a person is absent in a very distant country, for instance, in the *East Indies*, and the agent who had a procuration from him in his own country is dead, so that there is nobody to take charge of his affairs, the prescription nevertheless

takes place. He does not fall within the rule *contra non valentem*, &c. for, however distant he is, he may receive intelligence from his own country, and transmit another procuration. But there may be circumstances under which it is not possible to do so, and when these are fully made out, he may have the benefit of the rule.

[650] The time of prescription runs against a succession, although vacant, abandoned, and without a curator: for the creditors of such succession, who are persons having an interest in the preservation of the rights of the succession, may procure the appointment of a curator, therefore, they cannot avail themselves of the rule *contra non valentem*, &c.

Henrys has expressed an opinion, that a prescription ought not to run against the rights of a succession, while the heir is availing himself of the time for deliberation allowed by the ordonnance.

This opinion has not been followed; the heir, during that time, had the power, without binding himself by the acceptance of that quality, to exercise all conservatory acts, and to interrupt the course of prescriptions; therefore, he is not within the rule *contra non valentem*, &c.

[651] Prescription takes place even against the farmers of the king's revenue, for the debts dependent on the rights which they hold in farm; nor is this repugnant to the maxim of there being no prescription against the king, for that maxim only concerns the king's domains, which are imprescriptible; but the debts to the farmers, which only relate to the rights held by themselves, are not the substance of the royal domain, but the fruits of it, and the fruits belong to the farmers.

The king himself is not considered as subject to any human law, nor consequently to the law of prescription; but his farmers are subject to the laws, and consequently to the law of prescription, as well as any other, and are bound to pursue their demands within the limited time.

[652] The prescription of thirty years does not take place against the church; but only the prescription of forty years, of which we shall speak *infra*.

But it is the church rather than the person of the beneficiary that is exempted from the ordinary prescription. Therefore, that prescription is allowed, except when it relates to the ground and foundation of the right. But the arrears of rents due to the church, and other casual profits, which rather concern the personal benefit of the incumbent than the church itself, are subject to the common prescription of thirty years.

When the church succeeds to the interest of an individual, it has only the same right with the individual as to the time which
had

had elapsed prior to the succession, according to the rule, *qui alterius jure utitur, eodem jure uti debet*.

The time of prescription, therefore, ought only to be extended according to the proportion which remained to run at the time of the succession. Therefore, as ten years are added to the ordinary prescription of thirty years, which is the addition of one-third, when a prescription begins first to run against the church; so when it has begun to run against a private individual, to whom the church succeeded, there ought to be an addition of one-third to the time which remained at the period of the church coming to the succession. Thus, if fifteen years had elapsed, ten years are not to be added to the remaining fifteen, but only five, being one-third of the fifteen, and the prescription will be accomplished at the end of thirty-five years in the whole.

Vice versa, when an individual succeeds to the right of the church, he ought to enjoy the privilege of the church for a prescription of forty years, as to the time which is passed; and the prescription ought only to be reduced to thirty years, with respect to the remainder of the time. For instance, if twenty years had run against the church at the time of the right dissolving upon the individual, as twenty years is only one half of the time which is necessary to bar the church, to complete the prescription, it was necessary to allow the remaining half, not of the full time for prescribing against the church, but of the time of prescribing against the individual, that is, fifteen years, the time for prescription against individuals being one-fourth less than against the church; when the individual succeeds to the church, one-fourth must be deducted from the time which would remain, supposing the right of the church to have continued. Therefore, in the case supposed, five years are deducted from the twenty which remained to run.

Secular communities have the same privilege with the church, and a prescription cannot be acquired against them, under forty years. *Tronçon sur Paris le maître, &c.*

§ III. Of the Effect of the trentenary Prescription.

[653] The effect of the prescription is, that when it is accomplished, the debtor may, by opposing it to the claim of the creditor, obtain a judgment, declaring him to be discharged from the demand.

[654] Could the creditor in this case defer, at least to the debtor, an oath whether he has paid the debt? No; for this prescription is established not only upon a presumption of payment which results from the length of time which has elapsed, but

also as a punishment for the negligence of the creditor. The law having limited the time for bringing an action; after the expiration of that time, the creditor retains his claim, if it has not been acquitted, but he can no longer support an action for it; he has no longer *jus persequendi in judicio quod sibi debetur*, and consequently he has no longer the right of requiring from his debtor the oath which forms a part of this right of action.

[655] A prescription begun or complete against the creditor takes effect against his heirs, and other successors, either by an universal or a particular title, so that they have only the time which remained to the creditor, when they succeeded to him; and if the time had expired against the creditor, the same *fin de non recevoir*, which had attached against him, will continue to subsist against them. This is evident; for as they succeed to the rights of the creditor, and as all the right which they have is derived from him, they cannot have more from it than he had himself. *Nemo plus juris in alium potest transferri, &c.*

[656] There is greater difficulty with regard to a substitute, as to whether the time of prescription, which has run against the heir before the substitution takes effect, is to be imputed to the substitute after his right has attached. The reason for doubting is, that the substitute does not derive his right from the heir who was charged with a substitution in his favour, and against whom the prescription has begun to run. Nevertheless, it must be decided, that the prescription, whether begun or complete against the first taker, has the same effect against the substitute; for although the substitute does not derive his claim from the first taker, but from the testator who made the substitution, yet the right passes from the first taker to the substitute, and it can only pass such as it is, and, consequently, partially or wholly subject to prescription, if it was so in the life-time of the first taker: for, as he was the actual creditor up to the time of the substitution taking place, it was against him that the prescription ought to have taken place, and, in fact, did take place. The first taker could not *faciendo*, by disposing, transferring, or hypothecating the claim, prejudice the right of the substitute; because he could only transfer it such as it was, and, consequently, *cum causa fideicommissi*, with the charge of the substitution; but he may, *non faciendo, non utendo*, suffer the action depending upon such claim to perish. This is the precise disposition of the law 70. § *Fin. ff. ad Trebel. Si temporalis actio in hereditate relicta fuerit, tempus quo heres experiri ante restitutam hereditatem potuit, imputabitur ei, cui restituta fuerit.* It is true, that this law only speaks of annual actions; because, in the time of the jurist, whose law this is, ordinary actions were not subject to the prescription

prescription of any length of time; but after, they became subject to that of thirty years; there is the same reason for the decision. This is the opinion of *Richard, Traité des Subst. p. 2. ch. 13. N° 93, 94.*

[657] Prescription has its effect not only in point of law, but sometimes even in point of conscience. It is true that the debtor, who must know that he has not paid, cannot, in point of conscience, avail himself of the prescription, and, for this reason, it is called *improborum præsidium*; but as the prescription induces a presumption that the debt has been acquitted, the heirs of the debtor may, conscientiously, presume that such is the fact, and consequently may take advantage of prescription, if they have no knowledge, nor any just ground of belief to the contrary (a).

§ IV. *In what Manner Prescriptions not yet accomplished are interrupted.*

[658] The time of prescription is interrupted either by an acknowledgment of the debt, or by a judicial interpellation.

Any act (b), by which the debtor acknowledges the debt, interrupts the time of prescription, whether it be passed with the creditor, or without him. For instance, if, in the inventory of the effects of the debtor, the debt is included amongst the charges (*parmi le passif*), such inventory, though not made with the concurrence of the creditor, is an act which recognizes the debt, and interrupts the prescription.

[659] So far as the debtor is concerned, it is of no signification whether the act containing the acknowledgment was before a notary, or under private signature; but with respect to a third person, who is interested in having the debt prescribed, the act is of no service to the creditor, if it is only under private signature, unless it has acquired a date anterior to the accomplishment of the prescription, and which is authenticated either by a register (*le contrôle*), or by the decease of some of the persons who have subscribed it; for otherwise, these acts under private signature have no date as against third persons, except from the time of their being exhibited. This was established for the purpose of preventing the frauds which might be occasioned by the facility of antedating.

[660] A verbal acknowledgment of the debt, when it exceeds 100 livres, can hardly be of any use to the creditor; because, according to the ordonnance of 1667, verbal evidence is

(a) *Vide* Appendix, No. XV.

(b) Act here means written instrument.

not allowed where the object is above that sum, and where written evidence might have been procured. I think, however, that the decisory oath may be deferred to the debtor, with regard to his having acknowledged the debt within the time, and in the manner imputed to him; *nec obstat*, that the creditor cannot, as has been already decided, after the time of prescription is accomplished, defer the oath as to the fact of payment; the difference is, that where the accomplishment of the prescription is an undisputed fact, it is clear, that the creditor has no longer any right of action, and, consequently, has no right to defer the oath; but in this case, it is not agreed that the time of prescription is accomplished, and that the creditor has lost his right of action; but the creditor, on the contrary, maintains, that there was an interruption; it is true, that it lies upon him to prove it; *nam incumbit onus probandi ei qui dicit*; but in *inopia probationis*, he may defer the oath as to that fact. If the debt does not exceed 100 livres, I think the creditor may be admitted to give verbal evidence, that the debtor at such a time acknowledged the debt, and promised to pay it.

[661] The payment of the arrears of an annuity is an acknowledgment of such annuity; but as the acquittances are in the possession of the debtor, this acknowledgment is, in general, of no use to the creditor, who cannot produce them; at least, unless he takes counterparts, or the acquittances were passed before a notary, and the minutes of them are preserved.

The journal of the creditor, in which he has entered the payments made to him, cannot serve as a proof of such payments, because a man cannot make evidence for himself. *L. 5. (a) Cod. de Prob.*

If the annuity were due to a community, I think that accounts, solemnly rendered, in which the receiver had charged himself with such payments, would be evidence thereof, and consequently of the interruption of the prescription. For it is not probable, that the receiver, unless the money had been actually paid to him, would have been foolish enough to charge himself with it, and thereby oblige himself to the payment instead of the debtor. Besides, whether the debtor had actually paid the annuity, or the receiver had charged himself with it, and accounted for it as paid, without its being so, the community has received it, and had the benefit of it; there cannot then be any prescription, for that only takes place when the creditor has neither had the benefit of the annuity, nor used due diligence to obtain it. This is the jurisprudence of the *Chatelet d'Orleans*.

(a) *Instrumenta domestica, seu privata testatio, seu adnotatio, si non aliis quoque adminiculis adjuvantur, ad probationem sola non sufficiunt.*

[662] The second manner in which the time of prescription is interrupted is, by the judicial interpellation of the debtor; which is made by a command to pay, if the debt is subject to immediate execution, and by a process of assignation, if it is not so.

As each of these processes is executed by a serjeant, who is an officer of justice, they each contain a judicial interpellation.

They each of them interrupt the time of prescription, provided they are accompanied by the formalities which are requisite for their validity; if they are void, for want of any such formality, they do not; for, *quod nullum est, nullum producit effectum*.

A process before an incompetent judge does not, in strictness, interrupt the prescription; nevertheless, when the question of competence may have been doubtful, the Court, in pronouncing the incompetence of the judge, sometimes refers the parties to the proper judge, with a clause, requiring him to proceed between the parties, according to the state in which the proceedings were at the time of removing the process. *Imbert. 1. 22. 7 & 8. Dumoulin, in Styl. Parl. p. 7. art. 102.* cites an *arrêt*, of the 17th July, 1515, which referred to the judge of *Anvers*, with this clause, an assignation that had been made by mistake, before the judge of *Saumur*.

[663] When there are several debtors in solido, the acknowledgment of any one of them, or a judicial interpellation to any one of them, interrupts the prescription, with respect to all the others. This is decided by *Justinian*, in law *Fin. Cod. de duob. reis*, as we have already seen, *n. 272*.

It is otherwise with respect to several heirs of the same debtor; an acknowledgment by one, or an interpellation of one, only interrupts the time of prescription with respect to the part for which he is personally the debtor, and does not prevent the prescription of the part due from the other, who has neither acknowledged the debt, nor received any judicial interpellation; for, a debt may be prescribed as well as extinguished in part.

This is the case even with respect to a debt for which each heir is, by way of hypothecation, liable to the whole; for, as each is only personally liable for his own debt, though subject to hypothecation for the whole, the creditor, by the interpellation of one, only exercises his right of personal action, in respect to the part for which that one was liable, and has only used his right of hypothecation upon the share of the property fallen to that one, but has not used his right of personal action as to the shares of the others, or his right of hypothecation with respect to their shares of the effects, and, consequently, the prescription is acquired to them as well against the personal action as against the right of hypothecation.

cation. Why, it may be said, will not the interpellation of one of the persons, in possession of the property hypothecated for my claim, interrupt the prescription against the other possessors of the same property, in the same manner as an interpellation of one of several debtors in solido interrupts the prescription against the others? The answer is, that my right of personal credit against several debtors in solido is one and the same personal right, and, therefore, by the interpellation of any one I use my right as to the whole claim, and interrupt the prescription not only against that particular debtor, but also against the others; the right against them not being a different right, but precisely the same with that which I have exercised by the interpellation. On the contrary, the rights of hypothecation, which I have in the different effects hypothecated for my claim, are *real* rights, which consequently reside in the different things that are subject to them, and therefore are as distinct from each other as the things in which they reside. For instance, when the house A and the house B are hypothecated to me for a certain claim, the right of hypothecation in A is as distinct from that in B, as the house A is distinct from the house B. I do not, by instituting an hypothecatory action against the possessor of A, and using my right of hypothecation in A, use any right in B, and consequently this action cannot interrupt the prescription of the hypothecation in B. According to these principles, the hypothecatory action against one of the heirs of my debtor only interrupts the prescription as to the rights of hypothecation in the share of that one, and not in the shares of the others.

When the debt is of an indivisible thing, such as a right of predial servitude, as each of the heirs is, in this case, personally debtor of the whole, an interruption of the prescription against one is an interruption against all; it is otherwise, when the thing due is even intellectually susceptible of division.

The judicial interpellation of one of the debtors in solido interrupts the prescription, not only against the other debtors, but also against their heirs; the reason being the same.

In like manner, the judicial interpellation of the heir of one of the debtors in solido interrupts the prescription against all the other debtors.

But the interpellation of one of the heirs of one of the debtors in solido, of a divisible debt, only interrupts the prescription against the other debtors, so far as that heir is liable for the debt. Suppose, for instance, I have two debtors in solido, one of whom has left four heirs, an interpellation of one of these heirs only interrupts the prescription against the other debtor in solido, to the amount of the fourth, for which the heir interpellated was liable; for by such interpellation

terpellation I only use my right as to one-fourth, and consequently the prescription is acquired by the other debtor in solido for the remainder; and it is acquired by the other heirs of the deceased debtor *in toto*, as I have not in anywise used my right with respect to the shares for which they were liable.

[664] It is a controverted question, whether an interpellation to the principal debtor, or an acknowledgment by him, interrupts the prescription against the sureties? *Bruneman ad L. Fin. Cod. de duob. reis*, and the doctors cited by him, and *Catelan*, amongst the moderns, hold the affirmative. They insist, that the same reason which induced *Justinian* so to decide, with regard to debtors in solido, holds good with regard to sureties. This reason is, that the claim which a creditor has against several debtors in solido, being one and the same claim; after an interpellation against one of them, the others cannot say to the creditor, that he has not exercised the claim which he had against them. Now, say these authors, the same reason applies to the case of sureties: the claim which the creditor has against them is the same that he has against the principal, to whose obligation they have only acceded; whence it follows, that the creditor, by the interpellation of the principal, and using his claim against him, has also used his claim against the sureties; the claim being one and the same. They add, that if *Justinian* does not speak of sureties, it is only because they are, as to this point, comprised under the term *correi*; since they are *rei ejusdem obligationis*, they are co-debtors, not indeed as principals, but as accessory debtors of the same obligation. *Duperrier*, and the other authors cited by him, maintain the negative. They say, that there is a great difference between sureties and co-debtors in solido. When I have sold a thing to several purchasers, who have obliged themselves in solido for the payment of the price, the claim against them is one and the same claim, having the same cause, and for which there is only one and the same kind of action, viz. the action *ex vendito*, against each of them; whence it follows, that in exercising my claim by the judicial interpellation of any one of them, I exercise it against all the rest. It is otherwise, say they, with respect to the principal debtor and his sureties; the claim against the principal, and that against his sureties, are indeed claims of one and the same thing, and therefore a real or fictitious payment by the one discharges the other: but still they are distinct claims, arising from different contracts, and producing different actions. For instance, when I sell any thing to one man, and another engages as his surety for the price, the claim against the buyer, and that against the surety are, it is true, claims of one and the same thing, but still they are distinct claims: that against the principal
results

results from the contract of sale, and produces the action *ex vendito*; that against the surety results from his special engagement as such, producing a different action, viz. the action *ex stipulata*: and as the claims are separate and distinct, it cannot be said that the creditor, by using his claim against the principal, exercises it also against the surety, and therefore the interpellation of the principal does not interrupt the prescription as to the surety. These authors draw an argument from the law *Fin. Cod. de duob. reis*; this law, by deciding that the acknowledgment or interpellation of one of the debtors shall interrupt the prescription as to the others, assigns as a reason: *cum ex una stipe, unoque fonte unus effluxit contractus, vel debiti causa ex eadem actione apparuit*. Now, say they, sureties do not fall within the terms of this law, for though they are debtors of the same thing with the principal debtor, they are debtors by virtue of a different contract, and the action against them is different from that against the principal.

It may be replied, that the engagement of the sureties is a contract purely accessory, the sureties do nothing more thereby than accede to the debt of the principal debtor, the contract does not, properly speaking, form a new claim, but only gives the creditor new debtors, who accede to the debt of the principal; the claim which the creditor has against them is the same as that against the principal. As to the argument, that by the *Roman* law the action *ex stipulatu* against the surety is a different action from that against the principal debtor; I answer, that it does not therefore follow, that it is founded upon a different claim: the stipulation, upon which the action *ex stipulatu* is founded, is not itself the title of the claim, but rather the corroboration of it, with the accession of the sureties.

§ V. *In what Manner Prescriptions, after being accomplished, are destroyed (se couvrent).*

[665] A prescription, although accomplished, is destroyed, if the debtor afterwards acknowledges the debt; this acknowledgment excludes him from the *fin de non recevoir*, which resulted from the accomplishment of the time of prescription, and consequently destroys and annihilates it.

There is a great difference between an acknowledgment made after the time of the prescription is accomplished, so as to destroy it, and one made before, which has the effect only of interrupting it; the latter may be made not only by the debtor himself, but also by a tutor, curator, or person having a general procuration: it may be made by the debtor himself, though a minor, without his being entitled to restitution against it.

On the contrary, an acknowledgment made after the time of prescription is accomplished, so as to revive the debt, can only be made by the debtor himself, and he must be of full age; it cannot be made by a tutor, a curator, or a person having a general procuration, but only by one having a special procuration for the particular purpose. The reason is, that an acknowledgment made after the prescription is accomplished for the purpose of destroying it, involves a gratuitous alienation of the *fin de non recevoir*, acquired by the completion of the time; now the gratuitous alienation of a right exceeds the authority of a tutor, curator, or person acting under a general power.

From the same principle there results a second difference between an acknowledgment after the time of prescription is accomplished, and one before: the latter interrupts the prescription in respect of and against all persons whatever; the former only destroys it against the debtor making the acknowledgment and his heirs, but not against his co-debtors in solido, or sureties, or third persons, who have acquired an interest in the lands hypothecated for the debt. For the right of prescription having been once acquired by the accomplishment of the time, the debtor may, by his subsequent acknowledgment, very well renounce the prescription, so far as regards himself and his heirs, but cannot prejudice the right acquired by third persons.

[666] If the mere acknowledgment of the debt destroys the prescription, *a fortiori*, should the actual payment do so likewise.

A person, therefore, is deemed to owe what he pays after the time of prescription is accomplished, and is not entitled to repetition.

And further, he who pays a part of the debt against which he had a prescription, entirely renounces the prescription, even as to the residue, *Arg. L. 7. (a) § pen. & fin. ff. de Sct. Maced.* at least, unless he protests, at the time of payment, that he only means to acknowledge the debt so far as the sum paid.

According to these principles, it is clear that a debtor, by paying any arrears, destroys the prescription of an annuity.

[667] A sentence of condemnation against the debtor, when it has acquired the force of *res judicata*, that is, when it is no longer open to appeal, likewise extinguishes the prescription; and the debtor cannot afterwards be admitted to oppose the prescription, even if he has omitted to do so in the suit upon which

(a) Hoc amplius cessabit senatus-consultum, si pater solvere cepit, quod filius familiae mutuum sumperit: quasi datum habuerit, § 16. Si pater familiae factus solverit partem debiti, cessabit senatus-consultum: nec solum repetere potest.

the condemnation intervened, for this condemnation gives the creditor a new title.

A R T I C L E III.

Of the Prescription of forty Years.

[668] According to the dispositions of several provinces, amongst which is that of *Orleans*, an hypothecatory debtor, that is, one who has obliged himself by an act before a notary, cannot oppose the prescription of thirty years, but only that of forty.

These dispositions are conformable to the principles of the *Roman law*, and to the constitution of the Emperor *Justinian*, in the law *cum notissimi* (a) *Cod. de Prescr. trig. vel quadr.* which establishes this prescription of forty years; and it seems that they ought to be followed in the provinces, the customs of which are silent upon the subject. Such is the opinion of the commentators upon the customs of *Paris*, cited by *Le Maitre*.

To understand fully the reason of this law, and the grounds upon which an hypothecatory debt is not like other debts, prescribed at the end of thirty years, we must examine the nature of the prescription of thirty years.

The prescription of the personal claim, and that of the rights of property, and other real rights, are two distinct things, which ought not to be confounded; they have no resemblance to each other, except in point of time; and they are very different with respect to the manner in which they are acquired.

The prescription against personal claims is acquired by the debtor, without any act on his part, and results merely from the creditor not having instituted any action, and from there not having been any acknowledgment within the time limited by the law: it does not properly extinguish the claim, for that can only be done by a real, or supposed payment; it only extinguishes the action of the creditor, which at first had no limitation, but was by this law limited to thirty years. The action is extinguished *non ipso jure*, but by an exception, or *fin de non recevoir*, which the law allows the debtor against it.

(a) Cum notissimi juris sit, actionem hypothecariam in extraneos quidem suppositæ ei detentatores annorum triginta finire spatiis, si non interruptum erit silentium, ut lege tantum est, id est, etiam per solam conventionem, aut si ætas impubes excipienda monstretur, in ipsos vero debitores, aut heredes eorum primos vel ultiores nullis expirare lustrorum curribus: nostræ provisionis esse perspeximus, hoc quoque emendare, ne possessores ejusmodi prope immortalis timore teneantur.

The second kind of trentenary prescription is that, by which a person who has possessed an estate for thirty years as his own, and as free from incumbrances, acquires the property of the estate, exempt from any incumbrances which might affect it, although he does not shew any title.

This prescription, instead of being acquired, like the former, by the mere nonfeazance of the creditor, without any act of the debtor, is, on the contrary, acquired by the fact of possession in the person who prescribes.

The debtor who had hypothecated his estate could not, by this kind of hypothecation, acquire a liberation from the right which he had himself constituted; because he could not be regarded as possessing the estate as free from a right created by himself, neither could his heir: for *heres succedit in virtutes et vitia possessionis defuncti*, L. 11. *Cod. de Acq. Poss.* and the possession of the heir is regarded as the same with that of the deceased. Therefore, although the debtor, or his heirs, might have acquired by the first kind of trentenary prescription, a bar against the personal action of the creditor, they would always continue liable to the action arising from the hypothecation of the same creditor; for the estate would always remain hypothecated for the debt, which although prescribed, and destitute of an action, would subsist as a natural debt, and be a sufficient foundation for the hypothecation (a), L. 5. *ff. de Pig. et Hyp.*

Although *Anastasius*, by the law 4. *Cod. de Pras. Trig.* had introduced the prescription of forty years against all actions, which were not subject to that of thirty, this was held not to extend to the hypothecatory action against the debtor, for the reasons already stated.

At length *Justinian*, as we have seen, extended the prescription of forty years to the hypothecatory action against the debtor and his heirs; this is the disposition of the law *Cum Notissimi*.

[669] If the debtor, who is obliged, both personally and by way of hypothecation, had sold the estate to a third person, who wished to include in the prescription of thirty years, opposed by himself the time of the party from whom he derived his title, and who was personally obliged, he ought to add to the thirty years one third of the time which had passed previous to his own acquisition: for, as the person from whom he claims,

(a) *Res hypothecæ dari posse sciendum est pro quacunque obligatione; sive mutua pecunia datur, sive dos, sive emptio vel venditio contrahatur; vel etiam locatio et conductio vel mandatum: et sive pura est obligatio, vel in diem vel sub conditione; et sive in præsentis contractu sive etiam præcedat. Sed et futuræ obligationis nomine dari possunt: sed et non solvendæ omnis pecuniæ causæ, verum etiam de parte ejus; et vel pro civili obligatione vel honoraria, vel tantum naturali: sed [&] in conditionali obligatione non alias obligantur nisi conditio extiterit.*

could only prescribe after the period of thirty years, and one fourth of that time, the other cannot in his right prescribe within a shorter time, according to the rule, *Qui alterius jure utitur, eodem jure uti debet.*

[670] The disposition of the law, *Cum Notissimi*, has only been adopted with respect to hypothecations, upon acts passed before notaries. Debtors by judgment have the benefit of the ordinary prescription of thirty years, although the ordonnance of *Moulins* gives a right of hypothecation where there is a judgment; for the law gives this hypothecation rather to the personal action, *ex judicato*, than to the debt upon which the adjudication is founded. Therefore the hypothecation is extinguished by the same prescription of thirty years as the personal action.

It is the same with respect to all other hypothecations, given by the laws, they are extinguished with the personal action to which they are attached.

[671] The mixed (*personnelle réelle*) action for seignoral rents, and similar causes, is also subject to the ordinary prescription of thirty years.

A R T I C L E IV.

Of Prescriptions of six Months, and one Year, against the Actions of Tradesmen, Artisans, and other Persons.

§ I. *In what Cases the Prescription of six Months takes place.*

[672] According to the ordonnance of *Louis XII.* of the year 1510, Art. VI. VIII. drapers, apothecaries, bakers, and other dealers by retail, shall not be receivable after six months from the first supply, to demand the price of their goods, unless there has been a judicial interpellation, or the allowance of an account.

This ordonnance has not been exactly observed.

The custom of *Paris* has made a distinction; conformably to the ordonnance, it only allows six months to persons who deal in petty articles, or do petty pieces of work, after which time, computing from the first delivery, it declares them not receivable.

The 126th article of the custom is as follows: "trades-people, and sellers of things by retail, such as bakers, pastry-cooks, butchers, salt-dealers, and the like, cannot maintain an action after six months from the first delivery."

Persons who deal in articles of greater value, such as drapers, mercers, goldsmiths, masons, carpenters, are allowed a year to institute their actions for what is due to them.

Apothecaries have also a year, Art. 127.

[673] The ordonnance of 1673, which at present is in this respect the general law of the kingdom, appears to have followed the distinction of the custom of *Paris*. It declares in the first title Art. 7, that “dealers in wholesale, and by retail, masons, carpenters, tinmen, plumbers, glassmen, and others of like quality, shall be obliged to demand payment within a year after delivery.”

In the 8th article, it declares; that the action shall be commenced within six months, “for things sold by bakers, pastry-cooks, butchers, salt-dealers, and the like.”

[674] Our custom of *Orleans* has only admitted the prescription of six months, against demands for the hire of horses, Art. 266.

It expressly gives a year in article 265, for goods of trifling value, (*menues denrées*) and notwithstanding the ordonnance of 1663, it has always been customary, in this district, to allow a year indiscriminately to all tradesmen and artificers.

§ II. *In what Cases the Prescription of one Year takes place.*

[675] The prescription of one year takes place; 1st, Of common right, against the demands of tradesmen and artificers, included in the 126th article of the custom of *Paris*, and the 7th article of the 1st title of the ordonnance of 1673.

By the custom of *Orleans*, this prescription prevails against the demands of all tradesmen and artificers, without any distinction as to the goods, or work being of greater or less value.

2d, Against demands for the fees of physicians, and surgeons, according to the 125th article of the custom of *Paris*, which is followed in the provinces, where there is nothing established to the contrary. 3d, Against the demands of schoolmasters, and other instructors of children. Our custom of *Orleans* has this disposition, Art. 265, and it is the general law.

4th, For board and provisions. *Orleans*, 265, which is likewise the general law.

5th, For wages of servants. *Orleans*, 265, which is likewise the general law.

This term, *servants*, comprehends as well domestics in the family, as those who are employed in agriculture and manufactures; but not day labourers, who have only forty days, as we shall see hereafter.

§ III. *In what Cases these Prescriptions do not take place.*

[676] These prescriptions of six months and a year, do not take place; 1st, When the claim is established by any

act in writing, whether before a notary or under private signature, or by an allowance at the foot of an account, containing the charges, or in the books of the tradesman signed by the debtor; this is the sense of the terms of article 9. Vol. I. of the Ordonnance of 1673. "We will that the above shall be observed, unless within the year or six months, there is an allowance of the account or other written engagement, *un compte arrêté, cédule*, obligation on contract." In this case the claim is only subject to the prescription of thirty years.

[677] In the second place, these prescriptions do not prevail, if they have been interrupted by a judicial demand, before the expiration of the time and the demand has not been discontinued, this is common to all prescriptions.

[678] Thirdly, these prescriptions are not observed in consular jurisdictions in cases where goods have been supplied by one tradesman to another, for the purpose of his business, and the parties have running accounts in their books. There is a famous case to this effect of the 12th July 1672, *Journal du Palais*. The custom of *Troyes* has a disposition for the purpose.

For instance, a shoemaker, or joiner, cannot oppose this prescription to a carrier, or dealer in wood, who produce their books containing a running account.

[679] Fourthly, these prescriptions do not run against persons out of business (*les Bourgeois*) who sell the produce of their lands, such as corn, wine, wood; for the ordinance as well as the customs only apply to persons in trade.

A person is not to be considered as a tradesman, who although actually in trade, sells the produce of his land which is different from the article that he deals in; as if a grocer sells the wine made in his vineyard.

Although a person out of business is not subject to the prescription of a year, yet if he makes his demand after a very considerable length of time, though less than thirty years, against a tradesman to whom he had sold the produce of his land, and who insisted that he had paid for it, though he had not any receipt to produce, it would be competent to the judge, in his discretion, to disallow the claim.

§ IV. *From what Time, and against whom, these Prescriptions run.*

[680] The prescription against the demands of tradesmen and artificers runs from the day of each article supplied, or each piece of work being done; and a continuation of the supply or of the work does not interrupt it: this is expressed in the ordinance

ordonnance of *Louis XII.* which says, *from the first supply*; by the custom of *Paris*, which says, *from the day of the first delivery*, and lastly by the ordonnance of 1673, Art. 9. which expressly declares that the prescription shall take place, *even although there shall be a continuance of the supply or of the work, (encore qu'il y eut continuation de fourniture ou d'ouvrage.)*

The reason is, that the claim of the tradesman or artificer is composed of as many separate demands as there are parcels of goods or pieces of work; which produce so many different actions, and each begins to run from the delivery, or from the work being done.

[681] With respect to physicians and surgeons, I think that the demand of a physician or surgeon, who has had the care of a person during an illness, should not be deemed to consist of as many different claims as there have been visits, but as one and the same demand, which was not complete until the attendance was finished, either by the patient's death or cure, or the discontinuance of the visits. Therefore, I think that the prescription ought only to run from the death of the patient, if he died of that complaint; or from the last visit, if there was a cure, or if the attendance was otherwise discontinued.

But if the physician or surgeon has given his attendance in different illnesses, there are as many demands and actions as illnesses, which ought to be respectively prescribed from the termination of each case.

[682] In the provinces, the customs of which are silent respecting servants, it seems proper to follow the ordonnance of *Louis XII.* which declares that they shall not be allowed to demand their wages after the expiration of a year from their quitting the service; and that within the year they shall not demand the wages of more than three years. This is the opinion of *Henrys* and *Brettonier*.

The customs of *Paris* and *Orleans*, having subjected the actions of servants for their wages to the prescription of one year, without distinguishing whether they remain in the employment of their masters or not, it may be contended, that the prescription of the servant ought to run from the expiration of each term of his service. For instance, according to this opinion, if a servant is hired for a year, he can only demand for the year last preceding, and the subsequent fraction of a year; if he is hired for a month, he can only demand for the current month, and the twelve months last preceding.

The same should be decided with respect to salaries for the instructing of children.

[683] *Dupleffis* and *Le Maître* think that these prescriptions ought not to run against minors. My own opinion is, that they run as well against minors as against persons of full age; 1st, Because the contracts upon which the action of tradesmen or artificers is founded, and against which this prescription is established, are made in their quality of tradesmen or artificers; now it is a principle that they are regarded as persons of full age, with respect to the contracts which they make in that quality, and with reference to their business or occupation. 2d, This prescription is not established as a penalty for the negligence of the creditor, which in a minor might be excused, but upon a mere presumption of payment, on account of its not being usual to wait so long for the payment of this kind of debts; which presumption is equally applicable to minors as others. 3d, As our customs do not except minors from these prescriptions, which they have taken care to do from the prescription of thirty years, we ought not to make any such exception.

§ V. Of the Foundation and Effect of these Prescriptions.

[684] These prescriptions are founded entirely upon the presumption of payment.

Hence it follows, that the creditor is not so far barred as not to be entitled to defer the decisory oath to the debtor, as to whether the sum demanded be really due or not, as is formally decided by the ordonnance of 1673, Vol. I. Art. 10. The custom of *Orleans*, has the same disposition, Art. 265. Herein these prescriptions differ from others, which, being established by way of punishment of the creditor, deprive him entirely of the right of action.

[685] The debtor to whom the oath is deferred is obliged to swear that the sum demanded from him is not due; in default of his doing so, the oath is referred back to the plaintiff, and upon such oath he ought to obtain sentence of condemnation.

[686] When the widow or the heirs of the debtor are assigned, they cannot be compelled to swear whether the debt was really due from the deceased; because the oath can only be proffered to any person with respect to his own act, *Arg. (a) L. 42. ff. de Reg. Jur.* *Paulus* states it as a maxim, *heredi ejus, cum quo contractum est, jusjurandum deferri non potest, Paul, Sent. 11.—1—4.*

(a) Qui in alterius locum succedunt, justam habent causam ignorantiae, an id quod petiretur, deberetur. Fidejussores quoque non minus quam heredes justam ignorantiam possunt allegare. Hæc in de herede dicta sunt, si cum eo agatur, non etiam, si agat; nam plane, qui agit, certus esse debet; cum sit in potestate ejus, quando velit experiri; et ante debet rem diligenter explorare, et tunc ad agendum procedere.

But

But if they cannot be obliged to swear that the sum demanded is not due, the ordonnance at least allows an oath to be deferred as to whether they do not know it to be so; this is precisely declared by the article 10. above cited, and in default of their taking the oath, it is to be referred back to the plaintiff: the ordonnance even directs that this oath may be deferred to the tutors of the minor heir of the deceased.

[687] If the widow, who had a common property with her husband, should refuse to take the oath, or should even admit the sum claimed to be due, ought the heirs who offered to affirm that they had no knowledge of its being due to be condemned to pay? No: for the debt having by the death become divided between the widow and the heirs, the oath which was deferred to the widow, and upon her refusal is referred back to the plaintiff, only concerns that part of the debt which is due from her, and her refusal to swear, or her acknowledgment, can only bind herself; she may by her act prevent the prescription as to what she owes herself, but not as to what is due by the heirs.

It is the same if any one of the heirs acknowledges the debt, this acknowledgment is only obligatory as to the part due from himself, and will not oblige the others who swear they have no knowledge of it.

[688] The creditor has not only the right of deferring the oath, notwithstanding the prescription; he may even, when the object of the demand does not exceed a hundred livres, be received to prove by witnesses that the defendant has offered to pay the sum due since the demand, or even at any time since the time when he alledges himself to have paid it. The reason is that although the action which is founded upon the sale is prescribed, that which arises from the promise to pay, when it is proved as it may be, is a new action which is not prescribed.

A R T I C L E V.

Of several other Kinds of Prescriptions:

[689] The demand of day labourers for the payment of their hire, is prescribed at the end of forty days. Custom of Orleans, Art. 264.

This prescription, as well as the preceding, is founded upon a presumption of payment; it is presumed that these kind of persons who have occasion for their wages for their support, will not wait longer without obtaining payment, or at least demanding it.

Therefore this prescription, like the preceding, does not preclude the plaintiff from proffering the oath to the defendant, nor from

proving verbally that the defendant has offered to pay, if the demand does not exceed one hundred livres.

It may be asked, whether the prescription for the whole only runs from the last day's work? Strictly speaking, the prescription would seem to run from each day as to that day's work; for as the labourer might then demand payment, his right of action has commenced, and consequently the prescription of it ought to begin to run; nevertheless, it may be maintained that it ought only to run from the last day, especially if he has been kept all the time by the employer; because in general, labourers do not require to be paid until the work is finished.

[690] The demand of procureurs for their fees is prescribed at the end of two years from the decease of their clients, or the revocation of their authority. *Arrêt, 28th March 1692.*

The second article establishes another prescription against procureurs. It declares that they shall not, in cases remaining undecided, demand their expences and fees for more than six years back, although they have all along continued to be employed, unless they have been allowed and acknowledged by their clients, nor then, unless the amount is cast up, if it exceeds 2000 livres.

The *arrêt* only speaks of cases not decided; with respect to those which are terminated by a definitive judgment, the prescription of two years ought to run from the time when the authority of the procureur was determined by the judgment; in the same manner as it begins to run in cases still depending, from the time when the power ceases by revocation, or the death of the party.

[691] There is not any law which limits the time for bringing an action by notaries and officers of justice; it would be equitable to extend to them the prescription of six years, which is established with regard to procureurs; but there being no law, the matter must very much depend upon circumstances.

There is another kind of prescription against procureurs and officers, which arises from their returning the processes and proceedings to their clients; this restitution induces a presumption of payment, and it is commonly said at the bar, *pièces rendues, pièces payées.*

As procureurs are obliged by the regulations to keep a book in which they enter the payments made to them by their clients, in default of producing this book, they are barred from recovering their fees. *Rules of Court, 2d August 1692.*

[692] The demand of a party, for the restitution of papers intrusted to an advocate or procureur, is prescribed at the expiration of five years from the date of the definitive judgment or compromise, and at the end of ten years, if the case is not determined.

This prescription is of the same nature with the preceding, and is founded upon a presumption of the restitution of the papers ; and therefore it does not exclude the decisory oath.

It is the same with regard to the prescription in favour of counsellors of the Court, judges in the parliaments, their widows, and heirs ; they are discharged from any demand for papers relating to a suit at the expiration of three years from the sentence when the case has been decided, or from the decease of the counsellor, or resignation of his office, when it has not.

We have no law with respect to inferior judges, but the prescription of five years, which is allowed to advocates and procureurs, cannot be refused to them.

[693] All these prescriptions are wholly founded upon the presumption of payment or satisfaction, and do not prevent deferring the decisory oath to the defendant, as to whether he has actually paid the money, or retains the papers.

There are others against different kinds of actions, as that of ten years against rescissory actions (a), that of five years for the arrears of annuities and some others (b).

(a) Actions for setting aside contracts on account of form, fraud, minority, &c. these objections not being matter of defence, but requiring a fait for the rescission of the contracts.

(b) *M. Pothier* adds, that he reserves his observations upon these for the treatises upon the particular subjects.

P A R T IV.

Of the Proof of Obligations and their Payment (a).

[694] **H**E who alleges himself to be the creditor of another, is obliged to prove the fact or agreement upon which his claim is founded, when it is contested ; on the other hand, when the obligation is proved, the debtor who alleges that he has discharged it is obliged to prove the payment (b).

There are two kinds of proofs, (c) written and verbal, of which we shall treat separately, in the two first chapters ; confession, and certain presumptions are also regarded as equivalent to proofs, as is likewise the oath of a party, in certain cases. We shall treat of these in a third chapter.

C H A P. I.

Of Literal or Written Proof.

[695] Literal or written proof is that which results from acts or other writings. For instance, the literal proof of the obligations arising from agreements of sale or hiring is that which results from the writings that contain these agreements. The literal proof of the obligation arising from a judicial sentence is the act which contains the judgment (d). Literal proof of the payment of any obligation, is the acquittance given by the creditor.

These acts are authentic or private. Authentic acts are those which are received by a public officer, such as a notary, or register (*greffier*). Private writings are those which are made without the ministry of any public officer.

These acts are also either original or copies ; they are likewise distinguished into primitive titles, and titles of recognition. We shall treat in a summary manner of these different acts.

(a) See Appendix, No. 16. Sec. I.

(c) See Appendix, No. 16. Sec. III.

(b) See Appendix, No. 16. Sec. II.

(d) See Appendix, No. 16. Sec. IV.

ARTICLE I.

Of Original Authentic Titles.

§ I. What Acts are Authentic.

[696] Authentic acts are those which are received by a public officer, with the requisite solemnities.

To induce this quality, the act must be received in the place where the officer has a public character and right of attestation; therefore, if a notary receives an act out of the limits of the jurisdiction within which he is established as such, this would not be an authentic act.

By a particular privilege of the chatelets of *Paris, Orleans, and Montpellier*, the notaries of these chatelets have a right to receive acts throughout the kingdom.

[697] Although there are regulations which prohibit subaltern notaries from receiving acts, except between persons belonging to the jurisdiction within which they are established, and relative to property within the district, such acts are nevertheless authentic, these regulations having been regarded as *lois burfales*, and not having any effect.

[698] If the notary or public officer were interdicted from the exercise of his functions, at the time of his receiving the act, the act would not be authentic.

It is also requisite to the authenticity of the act that the proper formalities should be observed. For instance, that the notary should be accompanied by another notary, or two witnesses, that the act should be upon paper, properly marked (*timbré*), that it should be checked and registered (*contrôlé*).

[699] When the act is not authentic, whether from the incompetence or the interdiction of the officer, or for want of form, it has, if signed by the parties, at least the same credit against the party signing it as an act under private signature. *Boiceau*, Part II. Ch. 4.

§ II. Of the Credit which is given to Authentic Acts against the Parties.

[700] An original authentic act has in itself full credit, (*fait par lui meme pleine foi*) as to what is contained in it.

Nevertheless, when such act is produced out of the jurisdiction of the officer who received it, it is customary to verify the signature of the officer, by an act of legalisation subjoined to it.

This

This legalisation is an attestation of the judge royal of the place, certifying that the officer who has received and signed the act is in fact a public officer, notary, &c.

The signature of the officer who has received the act, carries full credit of every thing which the act contains, and of the signature of the parties who have subscribed it, which it is consequently unnecessary to establish by any further proof, (*de faire reconnoître* (a).

Nevertheless, authentic acts may be impeached as false (b) ; but until that charge has been decided, and they are adjudged to be so, credit is given to them provisionally, and the judges ought to ordain their provisional execution : this is decided by the law 2. *Cod. Act. l. Corn. de Fals.* (c) This decision is very wise. Criminality is not to be presumed ; and it would be very dangerous to let it be in the power of debtors to delay the payment of legitimate debts, by accusations of forgery. It is in consequence of this principle that *Dumoulin, in Conf. Par. § 1. gl. 4. n. 41.* decides, that a vassal, who produces an act acknowledging the performance of fealty, (*un port de foi*) which is disputed by the lord as false, ought to be discharged provisionally from a feudal seizure.

§ III. *In respect to what Things Authentic Acts have Credit against the Parties.*

[701] Authentic acts are entitled to credit, principally against the persons who were parties to them, their heirs, and those deriving titles under them. They have full credit against such persons as to all the operative part (*tout le dispositif*) of the act, that is to say, of every thing which the parties had in view, and which constitutes the object of the act.

[702] They are entitled to full credit, with respect to what is stated in enunciative terms, when the enunciations have relation to (*ont un trait à*) the disposition. *Dumoulin, in Conf. Par. § 8. gl. 1. n. 10.* For instance, if a person by an act acknowledges his obligation to pay an annuity in these terms, “ He acknowledges that such a house in his possession is subject to an annuity of ——— to Robert, the arrears of which have been paid to this day, and which he engages to continue,” these terms, the arrears of which have been paid, although only enunciative, are, nevertheless, proof of payment against a person who is party to

(a) *Vide infra*, No. 708.

(b) For this purpose there must be an original process, called *inscription de faux*.

(c) Satis aperte Divorum Parentum meorum rescriptis declaratum est, cum morando solutionis gratia, a debitore falsi crimen obijcitur nihilominus salva executione criminis debitorem ad solutionem compelli oportere.

the act, because they have relation to the disposition of the act, and it was proper to specify in the act what was due for arrears.

[703] With regard to enunciations in the act, which are absolutely foreign to the disposition, they may very well make a semi-proof (*a*), but they are not full proof even against the parties to the act. *Dumoulin, ibid.*

For instance, if in the contract for sale of an estate to me from *Peter*, it is said that the estate came to him by succession from *James*, a third person, who, as part heir of *James*, claimed a portion of it from me, could not prove merely by this enunciation in my contract that the estate was in fact part of the succession of *James*, because the enunciation was absolutely foreign to the disposition of the act, and I had no interest in opposing the insertion of it.

§ IV. In respect of what Things Authentic Acts have Credit against third Persons.

[704] The act proves against a third person, *rem ipsam*, that is to say, that the transaction which it includes has intervened. *Dumoulin, ibid. n. 8.*

For instance, an act, containing a sale of an estate, proves even against a third person that there was really such a sale at the time which the act imports.

Therefore, if the lord of a seignory enters into an engagement with a receiver, who obliges himself to pay all the seignoral profits arising within a certain term, the act, containing the sale of an estate situate within the seignory, is a proof that there was a sale of the estate, *probat rem ipsam*, against the receiver, although he is no party; and consequently the lord may demand from him an account of the dues arising on the sale, of which he ought to have obtained payment.

But the act is no proof against a third person, not party to it, of any thing which it states by way of enunciation.

For instance, if it were stated in the contract for sale of a house that it is entitled to a right of prospect over the adjoining premises, this enunciation will be no proof against the owner of those premises, who is a third person, not party to the act.

[705] This rule is subject to an exception, for in *antiquis enunciative probant*, even against third persons, when

(*a*) In this treatise there are several references to semi-proofs, a subject to which there does not appear to be any thing immediately correspondent in the English law. The effect of a semi-proof was, to allow the admission of parol evidence, or the suppletory oath of the party. It would be by no means an adequate representation, to state merely as being one circumstance, which, in conjunction with others, may be deemed sufficient evidence of a disputed fact.

such enunciations are supported by long possession. *Cravett de Antiq. Temp. p. 1. c. 4. n. 20.*

For instance, although long usage does not give a right of servitude (or easement), nevertheless, if my house has for a long time enjoyed a prospect over the house adjoining, and in the ancient contracts of acquisition by the persons under whom I claim, it is stated, that there is such a right of prospect, these ancient contracts, supported by my possession, will be evidence of my right against the proprietor of the adjoining house, although he is a third person, and those under whom he claims were no parties to the contracts.

[A sentence follows solely applicable to the customary law of *France*, which does not admit of an intelligible translation. The purport of it is, that in those provinces which do not admit a right called *franc aleu*, without a positive title, if the ancient contracts of sale declare the estate to be in *franc aleu*, the enunciation is evidence against the lord. Perhaps it would be in some degree analogous, to suppose that the ancient title deeds of an estate stated it to be subject to a certain *modus in lieu* of tithes.]

[706] From this principle, that authentic acts prove *rem ipsam* against third persons, the question may arise, whether an inventory, made before a notary, of the titles of a succession, stating an obligation for a certain sum entered into, by a particular person, at a specified time, before a given notary, is evidence against the debtor, who is a third person, and was not present at the making of the inventory, without its being necessary to produce the instrument, containing the obligation? This must be answered in the negative; for from the inventory proving *rem ipsam*, it only follows that there is an instrument purporting to contain such obligation, but not that the debt is due, because the non-production of the instrument induces a presumption that it had some defect, which prevents its establishing the debt, or that, subsequent to the inventory, it was returned to the debtor, upon his discharging the obligation.

Nevertheless, if it were shewn that, since the inventory, there had been a fire in the house where the writings were kept, which had destroyed them, the mention of the obligation in the inventory might be evidence of the debt, as it appears to be taken for granted, by the law 57. *ff. de Adm. Tut. (a)*, this decision might prevail, in case

(a) *Chirographis debitorum incendio exustis, cum ex inventario tutores convenire non possent ad solvendum pecuniam, aut novationem faciendam cogere, cum idem circa priores debitores propter eundem casum fecissent, id omisissent circa debitores pupillorum: an si quid propter hanc cessationem eorum pupilli damnum contraxerunt judicio tutelæ consequantur? Respondit si adprobatum fuerit, eos tutores hoc per dolum vel culpam præstitisse, præstari ab his hoc debere.*

the debtor did not allege that he had discharged it ; or perhaps, in case the time appointed for payment had not arrived, the presumption would be, that the debt had not been discharged. All this depends very much upon circumstances, and is left to the prudence of the judges.

A R T I C L E II.

Of Private Writings (a).

[707] There are different kinds of private writings : acts under common private signatures ; acts taken from public archives, censive (manorial) papers and terriers, tradesmen's books, domestic papers, writings not signed : tallies also have some resemblance to private writings.

§ I. *Of Acts under common private Signature.*

[708] Acts under common private signatures have the same credit against those who have subscribed them, their heirs or successors, as authentic acts. But there is this difference between the two, that the latter do not require any recognition, whereas the creditor cannot, by virtue of any act under a private signature, obtain a condemnation against the person subscribing it, his heirs or successors, unless he has previously concluded for (b) the recognition of the act, and obtained a judgment thereon (*conclu à la reconnaissance de l'acte & fait statuer sur cette reconnaissance*). See the edict of December 1684.

There is in this respect a difference between the person who has himself subscribed the act, and his heirs or successors. The latter, when they are assigned to acknowledge the signature of the deceased, may possibly not be acquainted with it, and therefore, they are not obliged directly, to admit or deny it ; and upon their declaration that they do not know whether it is genuine or not, the judge directs a verification (c). Whereas a person who has himself subscribed the act, cannot be ignorant of his own signature, and therefore must directly admit or deny it ; and unless he positively denies it, the judge will pronounce a recognition of the act as subscribed by him.

[709] In consular jurisdictions (d), when the defendant denies the truth of his signature, the consular judges ought

(a) See Appendix, N° 16. § 5.

(b) To conclude for any given subject, means to require a judgment in support of what is demanded ; for instance, in the present example, to require a judgment pronouncing the act to be genuine, the prayer of a bill in equity may be compared to the conclusions referred to.

(c) See Appendix, § 6.

(d) These are jurisdictions established with relation to commercial disputes.

to refer the case to the ordinary judge, to call for the recognition of the signature, and, in the mean time, the piece has not any credit. But there is this peculiarity in these jurisdictions, that as long as the defendant does not expressly dispute the truth of the signature, the piece has full credit, and the complainant may obtain a judgment of condemnation, by virtue thereof, without demanding a previous recognition. Declaration of 15 May, 1703.

[710] There is also a peculiarity with respect to *cedules* (a), and promises, by which a person engages to pay a sum for the loan of money, or other thing, that when the promise is in a different hand-writing from that of the person subscribing it, it is requisite that such person, besides his signature, should write with his own hand the amount of the sum which he obliges himself to pay, which is commonly done in these terms *good for* (*bon pour*) *such a sum*. This was ordained the king's declaration of the 22d September 1733, in order to prevent surprise upon persons who sign acts presented to them, without having read the contents.

But as commerce would be cramped, if all kinds of persons were obliged to this formality of writing, with their own hand, the sum which they oblige themselves to pay, and there are many persons who cannot write any thing beyond the signature of their name, the law excepts from its disposition tradesmen, artisans, labourers, and country people, against whom promises subscribed by them, are entitled to credit, although they do not contain any more of their writing than their signature.

[711] When the sum written in the hand of the debtor, without the body of the *cedule* or promise, is less than the sum expressed in the body, which is of a different hand-writing; for instance, if in the body it is said, I acknowledge to owe such a one the sum of 300 livres, and at the foot, without the body of the promise, it is written in the hand of the debtor, *good for* 200 *livres*, there is no doubt but that the promise is only binding for the 200.

If the body of the promise is wholly written in the hand of the debtor, as well as the *bon*, in case of doubt, as to what is really due, the decision ought, *ceteris paribus*, to be in favour of liberation; according to the rule, that *semper in obscuris quod minimum est sequimur*, l. q. ff. di R. I. Therefore, in the case supposed, the promise is only valid for 200 livres; but if the cause of the debt, expressed in the body of the promise, shews that the sum in the body is that which is really due, it must be decided otherwise. For instance, if the promise written in the hand of the debtor says,

(a) *Cedule* may be defined to be a note in writing.

I acknowledge to owe the sum of 300 livres, for fifteen yards of broad cloth, which he has sold and delivered to me, and it appears that that kind of cloth was about the price of twenty livres a yard, the promise will be binding for 300 livres, although it be under-written good for 200 livres.

[712] The same rules must be followed in deciding upon the opposite case: when the sum expressed in the body of the promise is less than that expressed in the *bon*, as if it were said, I acknowledge to owe 200 livres, and at the foot, *good for 300 livres; ceteris paribus*, the presumption is for 200 livres, unless from what is expressed, as to the cause of the debt, it appear that the amount really due is 300.

[713] When a person acknowledges himself to be debtor and depositary of a certain sum, according to the particulars specified in the margin, the sum to which those particulars amount is the sum due, although different from that expressed in the act; which in such case is an error of calculation.

[714] Acts under private signature are no evidence against the party subscribing them, when they are in his own possession.

For instance, if a note is found amongst my papers, by which I acknowledge that I owe you a certain sum that you have lent me, this will be no proof of the debt: for, being in my possession, the presumption is, either that I wrote it under the expectation that you would lend me the amount, and that the loan not having taken place, the note had remained with me, so that if you had in fact lent it, I had repaid it, and the note had been thereupon returned.

The same principle applies to acts of liberation, notwithstanding they are more favoured. For instance, if there appears amongst the effects of my creditor, an acquittance signed by him; for the money which I owe him, it will be no evidence of payment: for, being in his possession, it will be presumed that he had written it before-hand, under the expectation of my coming to pay the debt, and that as I had not done so, he had kept it.

[715] Acts under private signature, like authentic acts, are no evidence against third persons, further than to shew that the thing contained in the act really took place, *probat rem ipsam*; but they have not that effect to the same extent as authentic acts: for the latter, having a date verified by the attestation of the public officer, who received them, are evidence against third persons, that what is contained in the act took place on the day thereby specified; whereas acts under private signature, being liable to be antedated, are commonly no evidence against third

persons, that what they contain really passed, except from the day of their being exhibited.

Therefore, if I have seized the estate of my debtor, by virtue of an hypothecation, and the farmer who is upon the estate opposes the seizure, and pretends that it belongs to him, and in proof of that allegation, produces an act under private signature, by which it is said that the debtor sold him the estate, and this act has a date anterior not only to my seizure, but also to my debt; he will not thereby obtain a removal of my seizure, for the act being under private signature, does not prove against me, who am a third person, that the sale which it imports took place at the time specified in it; the act is not considered as having any date, except from the day of producing it to me, and as it is only produced after the seizure, it does not prove any sale before the seizure, when it was no longer in the power of my debtor to make a sale to my prejudice.

If, however, there was any circumstance to ascertain the date of the act, such as the death of one of the parties who had subscribed it, this would be evidence, even against third persons, of the act having been passed previous to such death.

§ II. Of private Writings taken from public Archives.

[716] The name of public archives is given to repositories of titles established by judicial authority. *Archivum*, says Dumoulin, *est quod publicè autoritate potestatem habentis erigitur*.

These repositories being only established for the preservation of genuine titles, they assure the truth of those which are found in them. Therefore, acts under private signature, with the attestation of the treasurer of the archives, are entitled to credit, without recognition. *Dumoulin in Conf. Par. § 8. gl. 1. n. 26.*

§ III. Of Terriers and censive (manorial) Papers (a).

[717] A person cannot make titles for himself: therefore acts which are not passed by any public person, such *cucillerets*, that is, registers of the lord of a manor, of the estates held under him, and the dues and services annually payable to him, do not prove the performance of those services, and consequently, are not a sufficient foundation for the lord to demand a recognition of them.

Nevertheless, when they are ancient and uniform, they form a semi-proof, which, joined with others, such as the acknowledg-

(a) See Appendix, N° XVI. § 4. *ad fin.*

ments of the proprietors of the neighbouring estates, may sufficiently establish the demand of the lord.

[718] These kinds of papers, which are not authentic, are no proof for the lord against other persons; but they are proof for others against him. Therefore, if the lord usurps upon my possession of an estate, I may support my demand for recovering it by his terriers, by which it appears, that he received the quit-rent of it from me and my father, to whom it was stated that he had made a grant of it.

But when the tenant makes use of the censive papers against the lord, the lord may, in his turn, make use of them against him; and in this case, the papers of the lord are full proof in his favour, *Dumoulin, ibid. n. 20.* For instance, if in the case supposed the tenant offers the censive papers of the lord, to prove that the estate belongs to him, as having been granted by the lord to hold of his manor, by certain services; the lord may use the same papers to prove that the estate is subject to all the dues and services which are there mentioned; and they are, in this case, a full proof in his favour.

Nevertheless, they would, even in this case, only be a proof in favour of the lord, of facts that have some relation to the subject, on account of which, they are made use of against him. For instance, the lord could not prove by these papers that another estate in my possession is also held of him. *Dumoulin, ibid.*

§ IV. *Of Tradesmen's Books (a).*

[719] As a person cannot make a title for himself, according to the principle which we have already established, it follows, that the books of tradesmen, in which they insert, from day to day, the goods which they deliver to different persons, cannot be a full and entire proof of the goods being supplied, against the persons who are debited for them.

Nevertheless, it has been established in favour of commerce, that when these books are so regular on the face of them, that they are written, from day to day, without any blank; when the tradesman has the reputation of probity, and his demand is made within a year after the delivery, they make a semi-proof; and judges often even decide in favour of the demands of tradesmen, by admitting their oath; as supplying the defect of proof arising from their books.

This is the sentiment of *Dumoulin, ad L. 3. Cod. de Reb. Cred. (b) tom. 3. p. 635. col. 2.* of the edition of 1681; where, speaking of

(a) See Appendix, N^o XVI. § 6.

(b) In bonæ fidei contractibus, necnon [etiam] in cæteris causis, inopiâ probationum, per judicem causâ cognitâ res decidi oportet.

the books of reputable tradesmen, he says, "*rationes ejus quomvis non plenam probationem, nec omnino semiplenam inducant, tamen inferunt aliquam præsumptionem ex qua possit ei deferri juramentum, ita ut per se rationes probent.*"

This ought more particularly to be allowed between one tradesman and another.

[720] *Boiceau*, p. 2. c. 8. requires that the books of the tradesman should be fortified by other circumstances; for instance, by proof that the defendant was accustomed to deal with the tradesman, and to purchase from him on credit. Such a fact, or some other of the same kind, being admitted, or proved by witnesses in case it is denied, this author decides, that the affirmation of the tradesman that he has supplied the goods mentioned in the book ought to be allowed.

[721] It may be added, that this should only be admitted when the charges do not amount to too considerable a sum, or contain any thing which is improbable, with reference to the situation of the defendant.

For instance, it would not be deemed probable, if it was stated in the books of a tradesman, that he had sold and delivered to me ten ells of black cloth, in the space of a year; as it is not likely that I should want more than one habiliment (a) in the course of a year, for which four ells would be sufficient.

[722] With respect to petty dealers, who do not belong to the class of tradesmen, but to the dregs of the people, *Boiceau, ibid.* thinks that their books are not entitled to credit.

[723] After having shewn how far the books of tradesmen are evidence in their favour, it remains to see what proof they are against them. And there is no question, but that they form a complete proof against them, as well of the agreements which they have made, as of the goods and payments which they have received.

This is the case even when the entry is made by the hand of a different person from the tradesman, provided it is clear that it is the journal which he is in the habit of using: for, being in his possession, the presumption is, that every thing contained in it was written with his consent. *Dumoulin, ad. L. 3. Cod. de Reb. Cred.*

Dumoulin, ibid. states, as a first limitation to the rule, that to make a tradesman's book evidence against him, of any sum which he acknowledges himself to owe, it is in general requisite that the cause of the debt should be expressed: for, as there cannot be any debt without some cause to produce it, and the writing alone

(a) I conceive the learned writer must allude to his gown, as judge, or professor:

does not make the debt, the demand of the debt cannot be supported until the cause of it appears.

But it is sufficient that a cause should appear by presumption and conjectures. Therefore, if one tradesman has written in his book that he owed so much to another, though the cause of it is not expressed, his book will be proof against him, if the other is a person from whom he was in the habit of getting the goods, used in his business; for, in this case, the presumption is, that the debt was for such goods. *Dumoulin, ibid.*

The second limitation, stated by *Dumoulin*, is, that credit should be only given to the book, and not to the loose papers (*papiers volants*), (a) that are contained in it.

The third limitation is, that the journal of a tradesman is no proof for me against him, unless I consent to its being used by him against me; for a person cannot claim a benefit from a piece which he rejects. *Dumoulin, ibid. Nam fides scriptura est indivisibilis. Dort. ad L. si ex. fals. 42. Cod. de Transf.*

§ V. *Of the domestic Papers of Individuals (b).*

[724] After having treated of the journals and papers of tradesmen, it comes next in order to speak of those of private persons.

It is clear that what we write in our domestic papers is no proof in our favour against any person, who has not subscribed them: "*exemplo perniciosum est ut ei scriptura credatur, qua unusquisque sibi adnotatione propria debitorem constituit,*" L. 7. Cod. de Prob. But are they proof against us? *Boiceau, p. 2. c. 8. n. 14.* distinguishes between writings which acknowledge an obligation from ourselves, and those which import the liberation of a debtor.

In the former case, for instance, if I have written in my journal, or on my tablets, that I have borrowed twenty pistoles of *Peter*, *Boiceau, ibid.* thinks, that if this entry is signed by me, it is a complete proof of the debt against myself and my heirs, and that if it is not signed, it is only a semi-proof, which ought to be fortified by some confirmatory circumstance.

I think the distinction of *Boiceau* a plausible one, but for a reason different from those assigned by him: when the note which I have made of the loan in my journal is not signed, it appears to have been made only for the purpose of keeping an account for my own use, and not to serve the creditor as a proof of the loan: and,

(a) All the French jurists speak of loose papers under this metaphor.

(b) See Appendix, N° XVI. § 6.

as he has no note to produce, the presumption is, that he has returned my note to me upon payment of the debt; and that thinking myself sufficiently secure by the restitution of the note, I have neglected to cross out the entry, and mention the payment. But my signature of the entry is an indication, that it was made with the intention of serving the creditor as a proof of the debt, and therefore, it ought to have that effect.

Although I have not signed the entry, if I have in any other manner declared or intimated, that I made it for the sake of serving as a proof, in case I should be surprised by death, as if I had declared by the entry, that the person who lent me the money, declined receiving any note for it; the entry, in this case, although not signed, ought to be allowed as a proof of the debt against me and my heirs.

When the entry, although signed, is crossed out, it is no longer any proof in favour of the creditor; on the contrary, the circumstance of its being crossed, is a proof that I have repaid the money, if the creditor has not any engagement from me in his possession.

§ VI. Of private Writings not signed (a).

[725] There are three kinds of these writings; 1. Journals and tablets; 2. Writings on loose papers (*sur feuilles volants*), and not at the foot in the margin, or upon the back of an act which is signed; 3. Those which are at the foot in the margin, or upon the back of a signed act.

We have spoken of the first kind in the preceding division.

Those of the second kind may be considered as they tend to oblige or to liberate.

With respect to those which tend to liberate, such as acquittances in the hand-writing of the creditor, not signed, and in the possession of the debtor; although we have decided in the preceding division, that receipts written in the journal of the creditor are full proof of the payment, without its being requisite that they should be signed, I do not think that the same decision should be applied to acquittances not signed upon loose papers, though wholly in the hand-writing of the creditor, and in the possession of the debtor. The reason of this difference is, that it is not usual to sign the entries of receipts in a journal; whereas it is customary for the creditor to sign the receipt which he gives to his debtor: therefore, when the receipt is not signed, it may be supposed that it was given to the debtor before payment; for instance, as a draft for the debtor, to examine whether he approves of the form

(a) See Appendix, N^o XVI. § 6.

in which it is conceived, and which the creditor purposed signing, when the debt was paid. Nevertheless, if the acquittance is dated, and so wants nothing but the signature; if it is merely a common receipt, of which it is not usual to make a draft; in short, if there does not appear to be any reason for its coming into the possession of the debtor, before payment; in such case, I think it ought to be presumed, that the acquittance was casually forgotten to be signed, and that it ought to be admitted as proof of payment, especially if supported by the suppletory oath of the debtor.

With respect to unsigned writings, or loose papers, which tend to the obligation of the persons writing them, such as a promise, an act of sale, &c. though they are found in the hands of the person in whose favour the obligation is purported to be contracted, they are no proof against the person writing them, that the obligation really has been contracted: they may have been mere proposals never carried into effect.

[726] It remains to speak of unsigned writings, which are at the foot in the margin, or on the back of a writing signed; these tend either to liberate, or to produce a new obligation.

With respect to those which tend to liberation, a further distinction must be made between the case where the act, at the foot, or on the back of which they are, is, and has never ceased to be, in the possession of the creditor, and that in which it is in the possession of the debtor. In the first case, as when at the foot, or on the back of a promise, signed by the debtor, in the possession of the creditor, there are acquittances of monies received on account, these, although not signed or dated, are a full proof of payment; not only when they are in the hand-writing of the creditor, but in whose ever writing they may be, even in that of the debtor; as it is not probable that the creditor would have allowed him to write such receipts on a note in his own possession, if the payments had not been really made.

Further, even when writings not signed, which are at the foot, or on the back of an act in the possession of the creditor, and which tend to liberate the debtor from the engagement contained in the act, are crossed out, they are still entitled to credit: for it ought not to be in the power of the creditor, in whose possession the act is, and still less ought it to be in the power of his heirs, by crossing the writing, to destroy the proof of payment which it contains.

[727] These dispositions apply when the act is in the hands of the creditor. What if it be in the hands of the debtor? As if there are duplicates of a contract of sale, and in the margin of that part which is in the hands of the buyer, the debtor of the

price, there is a receipt not signed? These writings will have full credit, if they are in the hand-writing of the creditor; such acquittances being on the act itself, which contains the obligation, have more force than unsigned acquittances upon detached papers. It is the same with respect to unsigned acquittances, in the hand-writing of the creditor, at the foot of a former acquittance which is signed; but if they are not in the hand-writing of the creditor, they are no proof of payment; as it ought not to be in the power of the debtor to procure a liberation from his debt, by getting any person, no matter who, to sign receipts upon the act in his possession.

Acquittances, though in the hand-writing of the creditor, and indorsed on the act in the possession of the debtor, are no evidence if they are crossed: for it is very unlikely that the debtor, who is in possession of the act, would have suffered them to have been crossed if there had been an effective payment; and it is reasonable to suppose that the creditor, having written the acquittance upon a proposal of payment, had obliterated it, because the proposal had not been carried into effect.

[728] With respect to writings not signed, which tend to produce an obligation; when they have reference to the act, at the foot, or on the back, or in the margin, of which they are contained, they are evidence against the debtor who has written them. For instance, if at the foot of a promise signed by *Peter*, by which he acknowledges that *James* has lent him a hundred pounds, there was written in the hand of *Peter*,—*I also acknowledge that James has lent me twenty pounds more*. This writing, although not signed, would be evidence against *Peter*; because the terms, *also, more*, have a reference to the act which is signed by him. *Boiceau*, 11. 2 and *Danty*, *ibid*.

So, if to a contract for the sale of a farm, signed by both parties, there is added a postscript, written by the seller, though not signed, importing that the stock upon the farm was included in the sale, this postscript would be evidence against him.

If it were in any other hand-writing, it is clear that it would be no evidence against the seller if produced by the buyer; but if the postscript were at the foot of the act, which is in the hands of the seller, though written by another person, it would be evidence against the seller; for he would not have allowed it to be subjoined to an act in his possession, unless the agreement had been such as it imports.

[729] When writings in the margin, &c. of an act have no relation to the act, and are not signed, they are to be regarded in the same manner as if written on any other loose papers. *Vid. supra*, n. 725.

§ VIII. Of Tallies.

[730] Tallies are the parts of a piece of wood cut in two which two persons use to denote the quantity of goods supplied by the one to the other.

For this purpose each of them has one of the pieces; that in possession of the debtor, is properly called the tally, and the other the *echantillon*.

When the goods are delivered, the two pieces are joined together, and a notch is cut in them, denoting the quantity supplied; such are the tallies of bakers.

These tallies are used instead of writings, and are a kind of written proof of the quantity supplied, when the buyer has the *echantillon* to join to the tally.

ARTICLE III.

Of Copies.

[731] It is a rule common to all copies, that when the original title subsists, they are no proof of any thing which is not contained in the original; as the notaries ought not, even under pretence of interpretation, to add any thing in the ingrossments and transcripts delivered to the parties, which is not contained in the original minutes.

Therefore, there can hardly be any question respecting the credit which is due to copies, so long as the original subsists; for if there is any doubt as to the contents, recourse may be had to the original.

There may be more difficulty with respect to the credit due to copies in case the original is lost. It is requisite to distinguish between those made by a public officer from those which are not. And the first must be further distinguished into three different kinds: 1st, Those which are made by the authority of a judge, the party being present or duly summoned; 2d, Those which are made without the authority of a judge, but in the presence of the parties; 3d, Those which are made without the parties being either present, or summoned: we shall treat of these kinds in the three first paragraphs. The register of insinuations contains copies made by a public officer: we shall treat of it in a fourth paragraph. We shall treat in the fifth, of copies not made by a public officer. And in the sixth, of copies of copies.

§ I. Of Copies made by the Authority of a Judge, the Party being present or duly summoned.

[732] He who would have a copy of this kind, which is as good as an original, presents a petition to the judge; the foot of which the judge ordains that a copy shall be made from the original of such an act, at a given place, and on a particular day and hour, and that the parties interested shall be summoned to attend; in consequence of this order, the parties are summoned to attend at the hour and place appointed.

The copy which is made in consequence of this order by a public officer, whether in the presence of the parties, or in their absence, after having been duly summoned, is called a copy *en forme*. If the original is afterwards lost, it has the same credit against the parties summoned, their heirs and successors, as would have been given to the original itself. *Dumoulin, in. Conf. Par. § 8. gl. 1. n. 37.*

[733] Observe, that when these copies are recent, the enunciation which they contain of the order of the judge, and of the assignations of the parties, is not a sufficient proof that these formalities have been observed. Therefore, the copy is not allowed in default of the original, as making the same proof which the original would have done, without producing the order of the judge and the assignation.

But when the copies are ancient, the enunciation of the observance of the formalities, is a sufficient proof that they have been observed, according to the rule *enunciativa in antiquis probant*; and it is not necessary to produce either the order of the judge or the assignations.

For a copy to be reputed ancient, so as to dispense with the production of the proceedings which are therein stated to have taken place, it is not requisite that it should be so old as thirty or forty years, as is necessary for supplying the defects of making full proof, which we shall speak of *infra*, n. 737; ten years is sufficient. Upon this principle it has been decided, that the purchaser of an estate under a judicial decree, whose title is impeached, is not obliged, after the expiration of ten years, to produce the proceedings upon which the decree was founded.

[734] These copies *en forme*, which, with respect to persons present or duly summoned have the same credit as the original, have not, with respect to other persons, any other effect than copies made without any persons being summoned or present, which we shall speak of *infra*, § 3. *Dumoulin, ibid. d. 2. 37.*

§ II. *Of Copies made in the Presence of the Parties, but without the Authority of a Judge.*

[735] These are not properly copies *en forme*, since they are made without the authority of the judge; nevertheless, they have the same effect between the parties who were present, their heirs and successors, as copies *en forme*, and are regarded as such when the original is not forth-coming.

They derive this authority from the agreement of the parties; for, the parties have by their presence, when the copies are made tacitly, agreed that they should be in lieu of the original. These copies, however, have not always the same force as copies *en forme*; for as they derive all their force from the agreement of the parties, it follows, that they cannot have any force in respect of things, upon which the parties have no power to make any agreement, and which are not at their disposal.

[The illustration relates to the grant under a chief rent (*bail à emphytéose*) of an estate belonging to a benefice, which was only good if accompanied by certain formalities, not particularly mentioned;—the copies of the instruments requisite for that purpose, made in the presence of a predecessor, have not the same credit against the successor as the originals or copies *en forme*: for the predecessor, who had not the free disposition of the benefice, could not, in prejudice of his successors, agree that such copies shall be allowed to be conformable to original acts, establishing the validity of an alteration of the estate.]

§ III. *Of Copies made in the Absence of the Parties, and without their being judicially summoned.*

[736] Copies which are taken from the originals, without the presence of the parties, and without their being summoned, are not in general a full proof against them, of the contents of the original, in case of the original being lost; such a copy is only an *indicium* or commencement of proof; which is sufficient to admit a proof by witnesses, to supply the defect of the copy.

This decision holds good, whether the copy was made with or without the order of a judge; for it is the same thing, whether there was an order which has not been made use of by summoning the party, or no order at all.

This decision, according to *Dumoulin*, takes place even when the copy has been made by the same notary who received the original. For instance, I pass a procuration before *George*, a notary, for *Peter*,

to sell my house to *James*; *Peter* sells the house to *James* by virtue of this procuration, a copy of which is inserted at the foot of the contract of sale; which copy is signed by *George*, who attests that he has taken it word for word from the original received by him. Afterwards I claim the estate from *James*, and the original of the procuration which I had given to *Peter* being lost, there is nothing to shew against me but this copy. The copy will not be a full and entire proof of my having given the power; the reason is, that this copy proves indeed that there was an original from which it was taken; but not having been taken in my presence, or after summoning me, it is no proof against me that the original had all the characters requisite to entitle it to credit; it does not prove that my signature which is said to have been subjoined to the original, was genuine: it is true that the fact is attested by the notary who received the original, and who saw me sign it; but, says *Dumoulin*, a notary can only attest and verify what he is required to attest by the parties. “*Non potest testari nisi de eo de quo rogatur a partibus* ;” he can only attest what he sees and hears, *propriis sensibus*, at the time of the attestation; now at the time of making this copy, he only saw that there was an original, but he did not at that time see me sign it; he was not required by me to attest that there was a regular original signed by me, from which he took the copy, since it is supposed to have been taken in my absence; and consequently he could not give to such copy the authority of an original. *Dumoulin, dict. § 8. gl. 1. n. 48. 62, 63, 64, &c.*

[737] What we have said is subject to an exception with respect to ancient copies: for these, whether made by the same notary who received the original, or another, are evidence against all persons in default of the original; because they enounce that there was a regular original, and *in antiquis enunciativa probant*.

This is laid down by *Dumoulin, ibid. n. 41*. “*Si exemplum esset antiquum, & de instrumento antiquo (non enim sufficeret originale fuisse antiquum, si exemplum esset recens). Tunc ratione antiquitatis puto quod plenè probaret contra omnes quantum ipsum originale probaret; ratio quia habet authenticum testimonium de autoritate & tenore originalis, cui antiquitas loco ceterarum probationum quarum copiam sustulit, auctoritatem plenæ fidei suppl. et.*”

A copy is commonly reputed to be ancient when it is thirty or forty years old: for, according to *Dumoulin, ibid. n. 81 & 82*. except in matters relative to rights which only admit an immemorial and centenary possession, as to which an act is only deemed ancient after a hundred years, acts are reputed ancient when they are thirty or forty years old. They may even, according to this author,

author, be allowed as ancient at the end of ten years, "*ad solemnitatem presumendam nisi agatur de gravi prajudicio alterius,*" *ibid.* n. 89.

§ IV. *Of the Register of Insinuations (a).*

[738] The copy of a donation which is transcribed in the register is not evidence of the donation; otherwise it would be in the power of an ill-disposed person to make a forged donation, which he would get transcribed in the register of insinuations; and elude the proof of the forgery, by suppressing the original. But *Boiceau*, p. 1. 11. thinks that the register is at least a commencement of proof by writing, which should authorise a testimonial proof of the donation. *Danty* is of opinion, that there is considerable difficulty in this decision. To render such proof admissible, I would have at least two things concur; 1st, That it should be manifest, that the minutes of all the acts passed by the notary, within the year in which it is pretended that the donation was made, are missing: for, if only the minute of this supposed donation was not to be found, suspicions would arise from the suppression of the act, which would create a doubt respecting either the truth or the form of it, and prevent the admission of proof by witnesses. 2d, I think the donatary should be required to offer proof by witnesses who were present when the act was passed, or at least, who had heard the donor admit it; and that it should not be sufficient to prove that some person had seen the donation in the hands of the donatary; for the witnesses who had seen the act might not know whether it was authentic or had the proper forms.

[739] If the insinuation had been made at the request of the donor, and he had signed the register; *Boiceau* decides, that it would be evidence of the donation, for the reason mentioned above; that judicial copies, made in the presence of the parties, have the same credit against a party who was present when they were made as originals.

§ V. *Of Copies altogether informal and not made by any public Person.*

[740] Copies not made by any public person, are those which are called absolutely informal; they do not, even if ancient, form any proof, and can at most furnish a very slight inference.

(a) This register appears by the context to be appropriated to the entry of donations.

Nevertheless, if a person produced such an informal copy, in order to draw some inference from it, the other party might make use of it as proof against him, because by producing it himself, he is deemed to recognize the truth of it; as a person ought not to produce any pieces which he does not believe to be true.

When a copy has been made by a public person, as a notary, but without calling in witnesses, or another notary, it is not considered as made by a public person, and is equally informal, as if it had been made by any private individual: for a person is not considered as having a public character, except so far as he acts in conformity to it. "*Persona publica*," says Dumoulin, "*agens contra officium personæ publicæ, non est digna spectari ut persona publica*."

§ VI. Of Copies of Copies.

[741] It is evident that a copy taken not from the original, but from a preceding copy, although *servato juris ordine*, can only be equal proof with that from which it was taken, and against the same persons.

Sometimes this second copy, although taken *servato juris ordine*, is not the same proof against the same persons as the preceding copy would have been; as when the person to whom it is opposed had not the same reasons for contesting the original, at the time of taking the preceding copy, as he has at present with respect to the person who has taken the second.

Dumoulin, § 8. gl. 1. n. 34. gives this example; *Peter* has a copy made in the presence of my attorney, of the whole of the testament of one of my relations, and whom I have succeeded as heir, and obtains a legacy of a hundred crowns; this copy is taken from an original deposited with a notary. Afterwards *James* comes and demands a legacy of ten thousand crowns, by virtue of the same testament; and as the original has since disappeared, he presents a petition to have a copy taken in my presence, or after summoning me, from the copy taken by *Peter*. Dumoulin says, that this copy, taken by *James* from that of *Peter*, is not a full proof against me, as the copy taken by *Peter* from the original, would be in favour of himself; because, says he, *nova contradicendi causa subest*. I have now reasons for contradicting and contesting the original, which I had not when *Peter* took his copy; the demand of *Peter* was for an inconsiderable legacy of a hundred crowns, and it was not worth my while on account of that, to take the trouble of contesting the original, and I therefore neglected the means which I then had of doing so; but now that *James* demands ten thousand crowns, I have a very strong

strong interest in seeing whether the original testament appears to be regular. Therefore, although I made no objection to the copy of *Peter*, being taken as the copy of a regular testament, it does not follow, that I am bound to acknowledge the same thing with respect to the copy of *James*, taken from that of *Peter*.

A R T I C L E IV.

Of the Distinction between Primary Titles, and Titles of Recognition.

[742] The primary title, as the name implies, is the first title which has been passed between the parties, between whom an obligation has been contracted, and which contains such obligation. For instance, the primary title of an annuity is the contract by which it is granted. Titles of recognition are those which have been subsequently passed by the debtors, their heirs, or successors.

[743] *Dumoulin, d. § 8. n. 88.* distinguishes two kinds of titles of recognition, those which are in the form which he calls *ex certâ scientiâ*, and those which he calls *in formâ communi*.

Recognitions *ex certâ scientiâ*, which he also calls *in formâ speciali et dispositivâ*, *n. 89.* are those in which the tenor of the primary title is set out. These recognitions have the particular quality of being equivalent to the original, in case that should be lost, and they prove the existence of it against the person acknowledging, provided he has the disposition of his rights, and against his heirs, and successors, and consequently excuse the creditor from producing the original, in case of its being lost. *Dumoulin, ibid. n. 89.*

Recognitions *in formâ communi* are those in which the tenor of the original title is not set out; these only serve to confirm the original title, and to stop the course of prescriptions; but they only confirm the original title, so far as it is true; they do not prove the existence of it, or excuse the creditor from producing it. *Ibid.*

Nevertheless, if there are several accordant recognitions, some or even one of which is ancient and supported by possession; they may be equivalent to the original title, and excuse the creditor from producing it, more particularly when the original title is extremely ancient.

[744] Both kinds of recognition have this in common, that they are relative to a primary title, that the person making the recognition, is not considered as thereby contracting any new obligation, but only as acknowledging the former obligation contracted by the primary title. Therefore, if the recognition admits

admits that the party making it, is obliged further or otherwise than as the primary title imports; by producing the primary title, and shewing the error which has slipped into the recognition, he will be relieved.

This decision prevails even when the error appears in a long succession of recognitions; the original title must always be adhered to when it is produced.

"Hoc tantum interest," says Dumoulin, *ibid. n. 88.* *"inter confirmationem in formâ communi et confirmationem ex certâ scientiâ, quod illa (in formâ communi) tanquam conditionalis et præsuppositiva non probat confirmatum, hoc (ex certâ scientiâ) fidem de eo facit, non tamen illud in aliquo auget vel extendit, sed ad illum commensuratur et ad ejus fines et limites restringitur,"* &c. And elsewhere, § 18. gl. 1. n. 19. he says in general of recognitions, that *"non interponuntur animo faciendæ novæ obligationis, sed solum animo recognoscendi; unde simplex titulus novus non est dispositorius."*

[745] If the recognition, on the contrary, is for less than is imported by the primary title; if there are several accordant recognitions which go back for thirty years, which time is sufficient to induce a prescription, or to forty years when the creditor is a privileged person, the creditor cannot by producing the original title, support a claim for more than is contained in the recognitions, because there is a prescription acquired for the remainder.

ARTICLE V.

Of Acquittances.

[746] In the same manner as acts are passed for the proof of engagements, they are also passed for the proof of payments. These are called acquittances.

An acquittance, is evidence against the creditor who has given it, his heirs, or other successors, whether it were passed before notaries, or under private signature of the creditor.

There are even certain cases in which an acquittance is sufficient evidence, without being either passed before a notary, or signed by the creditor. See these cases *supra*, n. 724, 725, 726, 727, 728.

Acquittances either express the sum which has been paid, without expressing the cause of the debt, or they express the cause of the debt, without expressing the sum paid, or they express neither, or both.

Acquittances which express the sum paid, though they do not express the cause of the debt, are nevertheless valid; as if they were to say, *Received from A. B., so much this first day, &c.* In case

case the creditor giving the acquittance, had at the time several claims against the debtor to whom it was given; the debtor may apply it to that, which he has the greatest interest in having discharged, as we have seen *supra*, Part III. ch. 1. Art. VII.

[747] Acquittances which only express the cause of the debt, without expressing the sum which has been paid, are also valid, and are proof of payment of all that is due at the time for the cause expressed. For instance, if it were said, "*Received from such a one, what he owes me for the wine of my vineyard of St. Denis,*" such an acquittance is evidence of payment of what he owed me for the wine of that vineyard, the whole vintage, if the whole was due, the residue if any part had been paid.

But this acquittance does not extend to what is due, for other causes than that which is expressed, and it is not necessary to make an express exception. For instance, if I had given you an acquittance in the terms above specified, which only relate to the wine of *St. Denis*; you could not set it up in answer to my demand, for the wine of other vineyards.

When the debt, of which the cause is expressed in the acquittance, is one which consists in arrears, (or periodical payments) as rent or an annuity, it is evidence of the payment of all that was due, up to the last preceding day of payment; but does not extend to the proportion which has incurred since. For instance, if you are my tenant of a house, the rent of which is payable at the feast of *St. John*, or my debtor of an annuity payable at that feast, and I give you an acquittance in these terms; 10th December, *Received of A. B., his rent or the arrears of an annuity*; this acquittance is good for all the arrears up to the preceding feast of *St. John*, but does not extend to the proportion which has since accrued.

Suppose the acquittance was not dated; as the want of a date prevents its being known at what time the acquittance was given; the debtor cannot thereby prove what was the term preceding, and up to which the payment has been made; in this uncertainty the acquittance proves nothing more than that the debtor has made one payment, and consequently he cannot avail himself of it any farther. If it was the heir of the creditor, who gave the acquittance, it would be good for the arrears accrued in the life-time of the deceased; because it is clear that those were prior to the acquittance, since the heir could only give an acquittance, from the time of his having that quality.

When the debt, the cause of which is expressed in the acquittance, is one divided into several kinds of payments, as if my father-in-law, has promised me a fortune of 2000*l.* for the portion of his

daughter, by four yearly payments; an acquittance from me to him without expressing the sum in these terms, "Received from my father-in-law, what he owes me (*ce qu'il me doit*) for my wife's portion," ought in like manner to be only applied to the terms of payment then elapsed, and not extended to the subsequent instalments: for although a sum, of which the term of payment is not arrived, may in one sense be very truly said to be owing; yet in common signification, which is the proper rule for construing the acquittance, these terms, *qu'il me doit*, are only understood of sums which may be demanded, and of which the term of payment is arrived; and therefore it is commonly said, *Qui a terme ne doit rien, Loyfel*. Besides it is not to be presumed, that a debtor would pay before the term.

There would be much more difficulty if the acquittance were in these terms *I have received my wife's portion*; these general and indefinite terms would appear to comprize the whole of the portion, and consequently the part of which the term of payment had not yet arrived.

When the acquittance does not express either the sum which has been paid, or the cause of the debt; as when it is conceived in these terms *Received from J. S. what he owes me*; this is a general acquittance, which comprizes all the different debts that were due, at the time of its being given. If amongst the debts there were some which could be demanded, at the time of giving the acquittance, and others which could not, it would extend only to the former, for the reasons already mentioned.

A fortiori, the acquittance ought not to be referred to the principle of annuities due by the debtor, but only to the arrears up to the last preceding term of payment.

Those debts ought also to be excepted, of which it is not probable that the creditor had any knowledge at the time of the acquittance. For instance, if you were my creditor of certain sums on your own account, and of others as the heir of *Peter*, whose succession had already fallen to you, but of which the inventory had not been made, a general acquittance from you to me in these terms, "Received from J. S. what he owes me," does not comprize what I owe to the succession of *Peter*: for, as you had no knowledge of the effects belonging to the succession of *Peter*, at the time of your giving the acquittance, it ought not to be presumed that you intended to include in the acquittance, what I owed you as heir of *Peter*, of which you was probably entirely ignorant.

If I owed you certain sums on my own account, and others, as surety of another person, would an acquittance from you to me in these terms, *Received from J. S., what he owes me*, include
what

what I owed you as surety? The reason of doubting is, that these terms taken literally, and in their generality, seem to include it, for I really owe, what I owe as surety; nevertheless, I think it ought to be presumed that you meant only to acquit me, from what I owed on my own account, *proprio nomine*, and not what I owed as surety; 1st, Because I might defend myself from paying what I owed as surety, until after the discussion of the principal debtors; and therefore in some sense, and in the common course of expression, I did not owe this money previous to such discussion. 2d, Because as I have recourse against the principals, for what I pay as surety, it must be presumed that I would require a particular acquittance for such payment, and that I should not be satisfied with these general terms.

If at the time of your giving me the general acquittance, I owed you several sums, one of which was secured by a note, that continued afterwards in your possession, would it be included? The reason for doubting arises from your retention of the note, which you ought to have delivered up, and which should not have remained with you, if I had discharged it; the reason for deciding that it is included is the generality of the terms, *what he owes me*, which comprize all debts owing at the time: the fact may be, that relying upon the general acquittance, I have neglected to get back my note, which might not be immediately at hand.

[749] The fourth kind of acquittance is that, which expresses both the sum paid, and the cause of the debt; this can hardly be subject to any difficulty. If the sum paid exceeded what was due for the cause expressed in the acquittance, the debtor, supposing he did not owe any thing else, would have a right of repetition for the excess by the *condictio indebiti*; if he was debtor on another account, he might apply the excess to that so far as he had an interest in having it discharged.

The question whether an acquittance for one or more years of an annual payment, is a ground for presuming the payment of the preceding years, is treated *infra*, ch. 3. § 2. Art. I.

C H A P. II.

Of Parol or Testimonial Evidence.

Parol or testimonial proof is that which is made by the deposition of witnesses.

ARTICLE I.

General Principles respecting the Cases in which this Proof is admitted.

[750] The corruption of manners, and the frequent instances of the subornation of witnesses, have rendered us much more difficult in admitting parol evidence than the *Romans* were. In order to prevent this subornation of witnesses, the ordonnance of *Moulins*, of the year 1566, *Art. 54*, directs, that in all cases, exceeding the value of 100 livres, contracts shall be passed, by which alone proof shall be received of such matters, without receiving any proof by witnesses, beyond what is contained in such contracts.

This disposition was confirmed by the ordonnance of 1667, *Tit. 20, Art. 2*, which is expressed as follows: "Acts shall be passed before notaries, or under private signatures, of every thing exceeding the value of a hundred livres, and no proof shall be received by witnesses against or beyond the contents of acts, even when they relate to a less sum than a hundred livres." (a)

In the succeeding article, the ordonnance excepts the case of unforeseen accidents, and cases where there is a commencement of proof by writing.

There is also in the first article an exception with respect to consular jurisdictions.

From these dispositions of the ordonnances, we may deduce four general principles, which determine the cases in which parol evidence ought to be received or rejected.

These principles are, 1. A party who had it in his power to procure a proof, in writing, is not admitted to give parol evidence, when the subject exceeds the value of a hundred livres, unless he has a commencement of proof in writing.

2. When there is an act in writing, those who are parties to it, their heirs and successors, cannot be admitted to give parol evidence against or beyond such act, even when the subject does not exceed a hundred livres, unless they have a commencement of proof in writing.

3. Parol evidence is admitted of things whereof the parties could not procure a proof in writing, whatever may be the value of the subject.

4. In like manner, when, by a fortuitous and unexpected event, acknowledged by the parties, or proved to have taken place, the written proof has been lost, parol evidence may be admitted, whatever may be the value.

(a) See Appendix, No. XVI. § 2.

ARTICLE II.

First Principle. A Party who had it in his Power to procure a Proof in Writing, is not admitted to give Parol Evidence, when the Subject exceeds the Value of a hundred Livres, unless he has a Commencement of Proof in Writing.

[751] The ordonnance of *Moulins* says, "We ordain that of all things exceeding the sum or value of 100 livres, contracts shall be passed," &c.

The ordonnance of 1667, *Tit. 20. Art. 2*, says, "Acts shall be passed of all things exceeding the value of 100 livres."

Although the ordonnance of *Moulins* does not say of *all agreements*, but uses the term *things*, which is more general, the commentators upon it are of opinion, that its disposition only extended to agreements, because it says, *CONTRACTS shall be passed*, and the term *contracts* is confined to agreements.

The ordonnance of 1767 having avoided the use of the term *contracts*, and having said, *acts shall be passed of all things*, it is unquestionable, that its disposition includes not only agreements, but generally all things of which the party demands permission to make proof, and of which he could have procured proof in writing. For instance, although the payment of a debt is not an agreement, the debtor who could have obtained an acquittance, which is a proof in writing, is not, when the payment exceeds 100 livres, permitted to make proof of it by witnesses.

[752] It was doubted, before the ordonnance of 1667, whether an involuntary (a) deposit was included in the disposition of the ordonnance of *Moulins*, which directs, that an act shall be made of all things exceeding the value of 100 livres, and excludes parol evidence. The reason of doubting was, that acts in writing are not commonly made of deposits, and a person who entrusts any thing to the care of a friend, will not, in general, venture to require a written acknowledgment, as the deposit is only made for his own convenience. Notwithstanding these decisions, the ordonnance of 1667, *Tit. 20. Art. 1*, has decided, that a voluntary deposit is included in the general rule, and that proof by witnesses ought not to be admitted of it, because the person who made the deposit was not obliged to do so, or might have required a written acknowledgment, and for want of doing so, he ought to run the risk of his depositary's fidelity, and take the blame upon himself, if he had reposed his confidence unworthily.

(a) It is so in the original before me; but the context evidently requires the word *voluntary* to be substituted for involuntary.

Some *arrêts*, previous to the ordonnance of 1667, had also admitted proof, by witnesses, of loans for use (*commodata*), because such a loan, like a deposit, is commonly made between friends, without taking any written acknowledgment; but the ordonnance of 1667 having declared, that a voluntary deposit was comprised in the general law, which requires a proof in writing, the same ought to be concluded, *a fortiori*, respecting such a loan, since a person trusts as much when he makes a deposit, as when he lends a thing to be used; and he who makes a deposit, has greater reason to be apprehensive of giving offence by demanding a written acknowledgment, than he who accommodates another with the loan of an article, to be specifically returned.

[753] A question is also made, whether bargains in fairs and markets ought to be included within the dispositions of the ordonnance. The reason of doubting is, that these bargains, in general, are made verbally, when there is no notary by to reduce them into writing. Nevertheless, it has been decided, that they are included; for as notaries are now established in the most insignificant places, and consequently, in all places where there are fairs, it is not a matter of much difficulty for the parties, when they make a bargain on credit, to call in a notary, if they cannot write themselves.

Observe, however, that with respect to bargains between one tradesman and another, whether made in or out of fairs, the judges-consuls are not restrained by the disposition of the ordonnance, and may, according to circumstances, admit proof, by witnesses, although the object exceeds the sum of 100 livres. It appears, by the process-verbal of the ordonnance of 1667, that the judges-consuls were supported in this usage, notwithstanding that of *Moulins*; that of 1667 preserves it expressly, by those terms of article 2, *without making any alterations in respect of what is observed in the jurisdiction of consuls.* (*Sans rien innover à ce qui s'observe en la jurisdiction des consuls.*)

[754] When a person claims damages, for the non-performance of a verbal agreement to do or not to do any thing; and it is uncertain whether such damages will or will not amount to 100 livres, the plaintiff, in order to be admitted to give parol evidence of the agreement, for the non-performance of which damages are claimed, ought to restrain his demand to a sum certain, not exceeding 100 livres; he ought even to do so in the first instance; for if he has once concluded for a larger sum, and thereby acknowledged that the object of the agreement exceeded 100 livres, and consequently, that the agreement was within the ordonnance, he will not, by afterwards reducing his demand, be admitted to give parol evidence. An argument, in support of this

this decision, may be drawn from an *arrêt* of the 7th December 1638, reported by *Bardet* VII. 46, in the case of a tailor, who, having instituted a demand against a widow, for cloaths furnished to her husband, to the amount of 200 livres, was excluded from the parol evidence, which he offered to give of her undertaking to answer for the debt, though he reduced his demand to 100 livres.

[755] I demand from you 60 livres, as the remainder of the price of a thing which I pretend to have sold you for 200 livres; you deny having bought any thing from me; ought I to be admitted to prove this sale by witnesses? *Boiceau* I. 18. decides in the affirmative; he cites laws which do not appear to me to have any application to the question. It is true, that when the question relates to the competence of a judge, who has only authority to decide to the extent of a certain sum, *quantum petatur querendum est, non quantum debeatur*, L. 19. § 1. ff. de *Jurisd.* because the judge only gives his judgment as to what is demanded. But in the case before us, the question whether the proof of the agreement ought to be allowed, depends upon whether the agreement is such as the ordonnance requires to be reduced into writing; now that is decided by the object of the agreement, which exceeds 100 livres, and not by what remains due. I cannot then be admitted to prove the agreement by witnesses, although the demand is only for the remaining 60 livres. This is the opinion of the commentator on *Boiceau*.

For the same reason, if, being heir of my father to the extent of one-fourth of his succession, I demand from you 50 livres, as the fourth part of a sum of 200 livres, which I pretend to have been lent to you by him, I shall not be admitted to prove the loan by witnesses.

[756] But in each of the preceding cases, if the plaintiff offered parol evidence, not of the sale for 200 livres, or of the loan of that sum, but of the promise made by the defendant to pay him the 60 livres remaining due, or the 50 livres for the fourth share, I think the proof ought to be received; for this promise is a new agreement, confirmatory of the former, and as the object of this agreement does not exceed 100 livres, there is nothing to prevent its being proved by parol.

[757] When several claims do not separately exceed the value of 100 livres, but they exceed that amount altogether, is the proof of all these claims admissible? It would seem that it ought to be so; for the ordonnance only having required acts to be made of things which exceed the value of 100 livres, no blame appears imputable to the party, for not having procured a proof by writing, and he ought not to be debarred from proof by

witnesses. Nevertheless, the ordonnance of 1667, art. 5, decides the contrary : for as the spirit of the ordonnance, in excluding such proof, is to prevent persons being exposed to the subornation of witnesses, with respect to iniquitous demands for considerable sums, exceeding 100 livres ; it ought to be refused, whether the sum demanded be for one cause or for several ; because it is as easy to suborn witnesses to depose to several false claims, as to depose to one singly. With respect to the objection, the answer is, that the creditor is not obliged to procure proof in writing, so long as his claims do not exceed 100 livres ; but when to those that do not exceed that sum, he adds another, which makes the whole amount to more than 100 livres, he ought to require an act in writing.

The ordonnance contains an exception when the claims or rights proceed from different persons. Therefore, I may be admitted to prove a loan of 60 livres, of which I demand payment in my own right, and another of 80 livres, as heir of my father, although together they exceed 100 livres.

A R T I C L E III.

Second Principle. That Proof by Witnesses ought not to be received against or beyond what is contained in a Writing (a.)

[758] Written evidence is, in our law, regarded as superior to parol ; therefore, the ordonnance prohibits parol evidence being admitted against the contents of a writing.

For instance, if I have made a note, by which I acknowledge myself to owe a person 100 livres, and which I promise to pay him at the end of two years ; I shall not be admitted to prove by witnesses that I received no more than 60, and that the remainder was for interest, which I was required to include in the note ; for this proof would be contrary to what is contained in the writing, and I must take the consequence of having given such a note.

[759] The ordonnance is not satisfied with excluding proof by witnesses, of what is directly contrary to an act ; it does not permit it to be received beyond the contents of an act, or respecting any thing which is alledged to have been said at the time, before or after. For when there is an act, the party must take the consequences of not having that expressed, which he now alledges to have taken place.

For instance, the debtor will not be admitted to prove by witnesses, that a certain term was allowed for payment, if it is not expressed in the act ; neither of the parties will be admitted to

(a) See Appendix, No. XVI. § 9.

prove by parol, that it was agreed that the payment should be made at a certain place.

A fortiori, the creditor will not be allowed to prove by witnesses that more is due than the act imports.

[760] It would be offering to prove something beyond the contents of an act, if the party required to prove what is contained in any detached memorandum (*une apostille ou renvoi*), not signed, or at least marked (*paraphés*) by the parties, though written in the hand of the notary, for these extraneous additions, are not considered as a part of the act. As if in the margin of a lease, by which the tenant is to pay 600 livres a-year, there is written (*un renvoi*) in the margin, *six capons more*, the landlord would not be allowed to prove by witnesses, that the tenant had agreed to pay such six capons.

What if the marginal addition were in the hand-writing of the tenant? *Vi. supra*, n. 728.

[761] When there is an act in writing of a bargain, and the time and place of making it are not expressed, can they be proved by witnesses? For instance, when a debtor demands to be received to the benefit of cession, can the creditor, in opposition to this demand, be admitted to prove, by witnesses, that the bargain which was the foundation of his demand, and of which there was an act in writing, was made at a fair, although this is not expressed in the act? *Danty*, 1. 9. *in fine*, decides, that this proof may be admitted; and that such evidence of the place where the bargain is made, is not a proof beyond the contents of the act: the time and place of making the bargain being circumstances extrinsic to the agreement, and not making part of the agreement contained in the act. This decision is subject to some degree of difficulty.

[762] All proof by witnesses, beyond the contents of an act, being prohibited, a party would not be allowed to examine the witnesses who assisted at the act, or even the notary who received it, to explain the contents, and depose to what was agreed upon at the time of making it. *Domat*. p. 1. l. 3. t. b. 2. n. 7.

[763] This exclusion of parol evidence against and beyond the contents of acts, takes place without distinction, even when the subject is below the value of 100 livres, as the ordinance of 1667, t. 20. Art. 2. expressly declares.

[764] Can a person who is debtor of 100 livres, or a less sum, by virtue of an act, be admitted to prove, by witnesses, the payment of the whole, or of part of the debt? It seems that he ought to be so admitted, and that the disposition of the ordinance, which forbids the proof by witnesses against and beyond the contents of the act, is not applicable to this case: for the debtor,

debtor, by demanding liberty to prove his payment, does not demand to prove any thing against the act, which contains his obligation ; he does not attack the act ; he agrees to every thing that is contained in it ; the proof which he requires to make is not then against the act, nor excluded by the ordonnance ; yet I observe, that in practice, whether from a misinterpretation of the ordonnance, or for some other reason, parol evidence is not admitted of the payment of a debt, of which there is an act in writing.

[765] Observe, that the ordonnance only excludes a proof by witnesses against the contents of an act, because it is in the power of the parties to procure a proof, in writing, by counter letters ; but if a party, in opposition to an act, alleges acts of violence, by which he was compelled to pass it, or acts of fraud, by which he has been surprised into giving his consent or signature, or the like ; as it was not in his power to have a proof, in writing, of such facts as these, there is no doubt but that he ought to be admitted to prove them by witnesses, even when he attacks the act by way of civil process.

A fortiori, when the act is impeached for criminality, as if it is alleged, that an act is one of those cases of exorbitant usury which require an extraordinary procedure.

[766] It remains to observe, that the prohibition of parol evidence against or beyond the contents of an act only extends to the persons who were parties to it, and who are to blame themselves, for not having inserted what was intended, and for not taking a counter letter ; but this prohibition cannot affect third persons, in fraud of whom, things might be stated in the acts contrary to the truth of what has passed, for nothing can be imputed to such third persons, and they ought not to be excluded from proving by witnesses the fraud which has been practised upon them, and of which it was not in their power to have any other evidence.

Therefore, a lord may be admitted to prove by witnesses, in opposition to a contract of sale, that an estate was sold for a larger price than that which is expressed in the act, with a view of diminishing the dues to which he is entitled ; *vice versa*, a relative may prove that an estate was sold for a less considerable price than that which is expressed in the act in fraud of his right of retrait (a). And many other instances of these frauds might be adduced.

(a) *Retrait* was a right, belonging, in some provinces, to the lord or the relations of a seller, to take an estate sold at the price agreed to be given by a stranger. *Pothier* has an express treatise upon the subject.

ARTICLE IV.

Of Commencement of Proof by Writing.

[767] A first kind of commencement of proof, by writing, is, when there is proof against any one by an authentic act, to which he was party, or by a private writing, written or signed with his hand, not of the whole that is alleged against him, but of something which leads to it, or makes part of it.

It is left to the discretion of the judge, to decide upon the extent of the commencement of proof by writing, which shall be sufficient to admit a proof by witnesses.

Boiceau gives several examples of this commencement of proof by writing.—*First example.* You assign me to give up an estate, of which I am in possession, I assert, that you have sold it me, and that I have paid the price; I have no other proof than a writing, signed by you, by which you promise to sell it for a certain price; this act does not prove the sale, and still less the payment, of the price; but joined to my possession of the estate, it forms, according to this author, a sufficient commencement of proof, to allow my giving parol evidence of the sale. *Boiceau*, II. 10.

Danty, *ibid*, observes, that this decision should be subject to an exception, where the promise to sell imported that there should be an act passed before a notary; for the parties having declared their intention, that there should be such an act, it is not to be supposed that the sale was proceeded in, if no such act appears.

I think, that even when the promise to sell does not import that an act shall be passed before a notary, the judge ought to be very cautious in admitting it as a commencement of proof sufficient to let in parol evidence of the sale; and that he ought not to allow it, if the estate was at all considerable, as it is not to be presumed that such an estate would be sold verbally, and without any act.

Second example. I demand from you 50 crowns, for the price of certain goods sold and delivered. I have no other proof than your note, which states, *I promise to pay J. S. 150 livres, for the price of the goods which HE IS TO deliver to me*; this is not a complete proof of my demand; as the note does not prove that I have delivered the goods; but it is a commencement of proof, which ought to let in parol evidence of the delivery. *Boiceau*, *ibid*. *Danty*.

Third example. You have passed a procuration to me, to resign your office; before I have obtained an authority to receive the office, you revoke the procuration. I maintain that you have sold me this office, for a given sum which I have paid you, and consequently, that you cannot revoke your procuration, without return-
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ing the price: I have no other written proof of what I advance, than your procuration to resign: this procuration is not a proof of the sale, and still less of the payment of the price; but it is proof of a fact which has relation to it, and which consequently may be regarded as a commencement of proof, so as to let me into parol evidence of the contract of sale, and of the payment of the price. Such is the opinion of *Loiseau*, in his treatise on these offices, L. 11. 61. cited by *Danty*, 11. 1. 14.

[768] *Fourth example.* You write me a letter, by which you request me to advance to the bearer, your son, 150 livres, which he has occasion for at the University; I assign you to repay me. I have omitted to get an acknowledgment from your son, but I am in possession of your letter. This is not a full proof that I have advanced the money, but it is a commencement of proof by writing, sufficient to allow a proof by witnesses.

If the person to whom the letter had been written had not been willing to advance the money, and your son had applied to another, to whom he had given the letter, the letter in possession of this last, would be a weaker proof than in the preceding case; nevertheless, *Danty*, 11. 2. 11. judges that even this is sufficient to authorise a proof by witnesses.

If the person to whom you directed me to advance the money was one against whom you would have a right of repetition; I should not be admitted to give parol evidence against you, unless I had taken his receipt: for, admitting that I have advanced the money, I cannot demand it from you, without having taken the receipt, which would be requisite to support your demand of repetition.

[769] If I have lent a minor a sum of money, and demand the repayment of it, alleging, that it has turned out to his advantage; the note which I have from him, acknowledging the loan, ought not to be regarded as a sufficient commencement of proof, so as to allow a proof by witnesses, that the money has been advantageously employed; for this would be rendering it easy for usurers to lend money to minors, and to recover it back, by engaging false witnesses to depose, that it had been usefully employed. *Danty*, 11. 4. 3.

[770] A second kind of commencement of proof by writing is, when I have a proof against any one by an authentic writing, to which he was party, or by a private writing, signed by him, that he was my debtor, but without such writing proving the sum; this is a commencement of proof by writing, which ought to admit me to prove the same by witnesses.

First example. I demand from you the payment of a hundred crowns. I have your billet which says, *I promise to pay J. S. the sum of one hundred ———* which he has lent me; the word crowns has been omitted in the note; you pretend that you have only borrowed a hundred sous which you offer to pay me; your note is a commencement of proof by writing, which ought to admit me to give parol evidence of the loan of 100 crowns.

Note, that in default of making such proof I could only demand 100 sous, according to the rule, *semper in obscuris quod minimum est sequimur*. Observe also, that in order to admit me to give parol evidence, it is requisite that there should be some probability in the amount of the sum which I pretend to have lent; therefore in the case supposed, I should not be admitted to prove by witnesses, that I had lent you a hundred thousand livres.

Another example of commencement of proof by writing; I demand from you a hundred pistoles, which I pretend that I have left in your custody as a deposit; I have no act of this deposit, but I have your note by which you acknowledge yourself to be my debtor, but without expressing for what sum, in these terms; *I will satisfy you with respect to what you know*; this letter does not contain a proof of the deposit of 100 pistoles, but it proves that you are my debtor; this is a commencement of proof by writing, which ought to admit me to proof by witnesses. *Arrêt* reported by *Chassonée*, and cited by *Danty*, 11, 1. 14.

[771] Private writings not signed form a third kind of commencement of proof, by writing, of what they contain against the person who has written them. For instance, I demand from a person thirty pistoles, which I pretend that I have lent him; I produce a note, by which he acknowledges the loan, written in his own hand, and dated, but not signed; this note is not sufficient to prove the loan; but it may according to circumstances, form a commencement of proof by writing, sufficient to authorise a proof by witnesses.

A fortiori, an acquittance written by the creditor, though not signed, of which the debtor is in possession, is a commencement of proof by writing of payment, which ought to admit the debtor to proof by witnesses, the proof of liberation being more favourable than that of obligation. *Danty*, 11. 1. 7.

Observe however, that for an unsigned acquittance to be allowed as a commencement of proof, by writing of the payment of a debt, it is requisite that the debt in discharge of which the payment is made should be expressed; a vague unsigned receipt is not any commencement of proof by writing.

In certain cases an acquittance, though not signed, is a full proof; as when it is written in the journal of the creditor, or on the back of the promise.

[772] According to the principles which we have laid down, the commencement of proof by writing ought to result, either from a public act, to which the person against whom the proof is offered was a party, or from a private act, signed, or at least written by him.

An act written by the party requiring the proof, cannot serve him as a commencement of proof, because no person can make evidence for himself.

From this however we must except the books of tradesmen, which, when they appear to be in proper order, are a commencement of proof in favour of those who have written them, as we have observed *supra*, ch. 1. Art. II. § 4.

[773] The writing of a third person cannot be such a commencement of proof as the ordonnance requires; for such third person is as a witness, and what he has written can only be equivalent to his parol testimony. Hence arises the decision of the question, whether the acknowledgment which a widow makes by her inventory, of a debt due from the community, is to be regarded as a commencement of proof by writing against the heirs of her husband? I do not think it is: for the widow can only be regarded as a witness, with respect to the heirs of her husband and the part demanded from them; and consequently her acknowledgment, so far as regards the heirs, does not amount to more than the deposition of a witness, and ought not, as it should seem, to form a commencement of proof by writing against them. Nevertheless, *Vrevin* upon the art. 54. of the ordonnance of *Moulins*, states an *arrêt*, which in consequence of such an acknowledgment of the widow, admitted a proof by witnesses against the heirs; but this *arrêt* was given at a time when the minds of people were not habituated to the disposition of the ordonnance of *Moulins*; which at that time was regarded as a law, contrary to the common law of the kingdom, and which could not be too much restrained.

It is the same with respect to an acknowledgment of a debt by one of the heirs, of a debt of the deceased; which is no commencement of proof against his co-heirs.

[774] Hence also arises the decision of the question, whether an act received by an incompetent notary, is a commencement of proof in writing, of what is contained in it against the parties who are said to have contracted, when the act is not signed by the parties, they being unable to sign? I think it is not: for an incompetent notary, being only a private person at the place where

where he has acted, his act can only be equivalent to the deposition of a witness, when the parties have not subscribed it. If the parties had subscribed it, it would, as we have observed, be good as a private writing.

I think the same decision should take place, when the writing is defective for want of some formality, as if a notary had received it without the assistance of witnesses: for, the notary not having comported himself as a public person, his act cannot be regarded as the attestation of a public person, and is only equivalent to the simple deposition of a witness, *supra*, n. 740. in *Fin.*

A R T I C L E V.

Third Principle. A Party who could not procure Proof by Writing ought to be admitted to give Parol Evidence.

[775] The ordonnance of *Moulins*, confirmed by that of 1667, did not, by ordaining that acts shall be made in writing, intend to require an impossibility, or even to require any thing which was too difficult, and which would cramp and hinder commerce, therefore it only excluded those from giving proof by witnesses, who might easily have procured proof in writing.

Whenever then it was not in the power of the creditor to procure a written proof of the obligation contracted in his favour, parol evidence of the fact inducing such obligation ought not to be refused, to whatever sum the object of the obligation may amount.

[776] According to this principle, parol evidence of injuries and neglects (*delicta et quasi delicta*) can never be refused; whatever may be the amount of the reparation which is demanded; for it is evident that it was not in the power of the person suffering from them to procure any other.

[777] For the same reason, every one is allowed to give parol evidence of the frauds which have been practised against him. For instance, parol evidence ought to be admitted of secret agreements, for giving the property of a party deceased, to persons who are prohibited from receiving it, in fraud of his heirs; for it is evident that it is not in the power of the heirs to have proof in writing of such fraud.

[778] It is the same with respect to the obligation arising from a quasi contract, as such obligation arises without the act of the persons in whose favour it is contracted, and it was not in his power to procure written evidence of it; he
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ought not to be precluded from proving the fact which he alledges by witnesses.

For instance, if a person during my absence occupies my lands, gets in the harvest and vintage, and sells the produce, he ought to give me an account of this administration; if he denies such administration, I ought to be allowed to prove it by witnesses; for I could not procure any other proof.

[779] There are also certain agreements made under particular circumstances, which hardly allow of an act being made in writing, when they take place, and of which the ordonnance therefore allows parol evidence, whatever may be the value of the object.

Such are deposits made in cases of necessity, as fire, shipwreck, tumults, &c. The ordonnance of 1667, *tit.* 20. Art. 3. expressly exempts these from the disposition which excludes parol evidence, in cases exceeding the value of 100 livres.

For instance, if in case of a fire, the owner of a house deposits the goods which he saves with his neighbours, and they deny such deposit, he will be admitted to prove it by witnesses, whatever may be the value of the goods deposited. For the precipitation, with which he was obliged to make the deposit, would not allow him to procure a proof in writing.

It is the same when in case of a civil commotion, or an incursion of enemies, I get my furniture out by a back way, and intrust it with the first person I meet with to save it from the enemy, or the insurgents, who are just entering at the front of my house; or when a vessel is driven on shore, and I hastily confide my goods to any body who is at hand; in all these cases, it is evident that it would be impossible to procure a proof in writing, and therefore the ordonnance of 1667 allows a proof by witnesses.

[780] For a similar reason, the ordonnance in the same title Art. 4. allows proof by witnesses, of deposits made by travellers with inn-keepers, for it is not usual for acts in writing to be made of such deposits, and an inn-keeper would not have leisure to make an inventory of all the articles intrusted with him by travellers, who are daily and hourly arriving.

A R T I C L E VI.

Fourth Principle. A Person who has accidentally lost a written Proof, may be allowed to give Parol Evidence (a).

[781] The same reason which renders it necessary to receive parol evidence, from a person who could not procure

(a) See Appendix, No. XVI. § 5.

evidence in writing, also makes it necessary when the party, by some unforeseen accident, has lost the instruments which would furnish him with written evidence.

For instance, if in the case of a fire, or the pillage of my house, I had lost my papers, among which were the notes of my debtors, to whom I had lent money, or the acquittances for sums which I had paid to my creditors; whatever the amount of such notes or acquittances might be, I ought to be allowed to give parol evidence of the sums which I had lent or paid, because it is by an unforeseen accident, and without my fault that I have lost the notes and acquittances, which would have furnished me with written evidence.

I may make this proof by witnesses, who depose that they have seen in my hands, before the fire, the notes of my debtors or the acquittances of my creditors, whose hand-writing they are acquainted with, and of which they remember the contents; or who depose to any knowledge of the debt or the payment.

But before the judge can admit this proof, it is requisite that the accident which has occasioned the loss of the writings should be clearly established. For instance, in the case above supposed, it is necessary that it should be admitted that my house has been burned, or pillaged, or that I should be in a condition to prove it, before I could give parol evidence of the loan or payment.

If the person who demands permission to give parol evidence, only alleges that he has lost his titles, without any proof of an inevitable accident occasioning such loss, he cannot be allowed to give parol evidence of the titles having existed; otherwise, the ordonnance which prohibits parol evidence, in order to prevent the subornation of witnesses would become illusory; for there would be no more difficulty in a person, who wished to prove by witnesses a loan or a payment that had never taken place, suborning witnesses who would say that they had seen the notes or acquittances in his possession, than in suborning them to say that they had seen the loan or payment of the money (a).

(a) See Appendix, No. XVI. § 5.

A R T I C L E VII.

In what Manner the Proof by Witnesses is made (a).

[782] When a creditor demands permission to prove the obligation which he alleges any person to have contracted in his favour; and in like manner, when a debtor offers proof of having paid the money which is demanded from him; if the proof is admissible, according to the principles stated in the preceding articles; the judge gives an interlocutory sentence, by which he permits the party to give the parol evidence that he requires; the other party being at liberty to prove the contrary.

This sentence is called an appointment to make inquests. In execution of the sentence, the parties ought within the time, and according to the forms prescribed by the ordonnance of 1667, Tit. 22, to produce the witnesses and have them examined before the judge, or a commissioner; and an act is made of their depositions, which is called an inquest.

[783] For the inquest to be allowed as containing a sufficient proof of the fact, which the party has undertaken to prove, it is requisite that such fact should be proved by at least two witnesses, whose depositions are valid.

The testimony of a single witness is not allowed as a proof, however worthy of credit he may be, and whatever may be the dignity of his situation, *etiam si preclara curie honore præfulgeat*. L. 9. Cod. de Testib. But a single witness makes a semi-proof, which, being supported by the oath of the party, may sometimes, in matters of very slight importance, be admitted as sufficient.

It is upon this principle that our custom of Orleans, Art. 156, decides, that when a person suffers his beasts to depasture in the land of another, where they commit some damage, the proof of the obligation resulting from this damage may be made by one witness, and the oath of the complainant, provided he does not claim more than 20 sols, if the damage has been committed in the day, or 40 sols if it has been committed in the night. See the articles 160, and 161.

When a person makes two different claims, which he has been admitted to prove, it is requisite that the proof of each should be made by two witnesses; if he examines two witnesses, one of whom only speaks to one claim, and the other to the other, there is no proof of either.

(a) See Appendix, No. XVI. § 10.

It would be the same, if the debtor had been admitted to the proof of two different payments; it would be requisite that each payment should be proved by two witnesses.

What, if I were admitted to the proof of one single demand, and in order to prove it were to examine several witnesses, who each deposed to different facts in support of my claim, but each fact was only proved by one witness; would the conjunction of all these witnesses, each speaking to a separate fact, be a sufficient proof of the demand? For instance, if I were admitted to prove that I had lent you ten pistoles, and one witness deposed that he was present at the loan, and another that he had heard you acknowledge the debt; would these separate witnesses of each fact form a proof of the loan? *Cravett de Antiq. Temp.* 17. *tom de Traët.* p. 175. n. 15. & *seq.* decides in the affirmative. The reason is, that as your acknowledgment supposes the existence of the loan, the deposition of the second witness concurs with that of the first in attesting such loan; the loan then, which is the only fact that I am to prove, is attested by two witnesses and consequently fully proved.

It would be the same if neither of the witnesses had been present at the loan, and the first witness deposed to an acknowledgment at one time, and the second at another; the loan would be fully proved by the deposition of two witnesses; for they both agree in deposing to a knowledge of the loan; as the time of making the acknowledgment is immaterial, so far as relates to its verifying the loan, it ought to be immaterial, whether they both depose to one acknowledgment made at one time, or each deposes to a different acknowledgment made at different times; it is sufficient that they both depose to a knowledge of the debt, and it is of no importance how that knowledge was acquired; whether by one and the same acknowledgment in the presence of them both, or by separate acknowledgments in the presence of each (a).]

[784] Although two witnesses are sufficient for the proof of a fact, nevertheless, as the party who is admitted to prove is not sure what the witnesses will depose, he may examine as many as ten upon one fact; the examination of a greater number ought not to be allowed for in the taxation of costs (b). *Ordin.* of 1667. t. 22. *Art.* 21.

[785] For a deposition to be valid it is requisite, 1st, That it should not be defective in point of form, otherwise it is declared void, and the judge pays no regard to it. See as to these forms the ordonnance of 1667. t. 22.

(a) See Appendix, No. XVI. § 11.

(b) This phrase may be thought wholly *English*; but the original expression is *taxe des depens*.

Observe, that when the deposition of a witness is declared null, on account of the act of the judge, who has omitted some of the formalities prescribed for the examination of the witnesses, the witness may be examined again, *Tit. 22. Art. 36.* but not when the nullity proceeds from the party who has neglected the observance of any of the proceedings directed for the completion of inquests.

2d, There must not be any exception against the person of the witness; we shall see the causes of exception in the following article.

[786] 3d, The deposition should not contain any thing to induce a suspicion of its sincerity. Therefore a deposition ought to be rejected, when it contains contradictions or facts beyond the reach of probability.

Above all, it is requisite that the witness, who says he has a knowledge of any fact, should shew how he has such knowledge. *L. 4. Cod. de Test. (a) Barth, ad d. l.* For instance, if I would prove that you had sold me such a thing, it would not be sufficient for the witness to say in vague terms, that he knew you had sold me that thing; he should state how he had that knowledge; for instance, that he was present at the agreement; or that he had heard you say you had made such a sale; if he said that he knew it from a third person, his deposition would not be any proof (b).

[787] A proof which a party makes by the deposition of two or more witnesses, who support what he has advanced, is not valid, except so far as it is not destroyed by the inquest of the other party. For instance, if upon a demand of damages upon an insult or reproach (*d'injures*), I examine witnesses, who say that they were present at the quarrel, and that you had said such and such things, which I had not retaliated; and on your side, witnesses are examined, who say that it was I who used such language to you, and that you had not retaliated; the inquests mutually destroy each other, and there is no proof on either side.

But if my witnesses were more numerous than yours, and were respectable persons, of known integrity, whilst yours were of the dregs of the people, the proof resulting from my inquest ought to prevail, and not be destroyed by yours. *L. 3. § 1. ff. de Test. numerus testium dignitas & autoritas confirmat rei de qua queritur fidem.*

(a) *Sola testatione prolata, nec aliis legitimis adminiculis causam adprobata, nullius esse momenti certum est.*

(b) See Appendix, N° XVI. § 12.

ARTICLE VIII.

Of the Quality of Witnesses, and the Exceptions which may be proposed against them (a).

[778] Witnesses produced to prove a fact are not required to have all the qualities which are necessary in those who are called upon to be present at the execution of written acts, in order to give them proper solemnity; women, foreigners not naturalized, members of ecclesiastical communities (*religious profès*), are admitted to depose in judicial examinations. The reason of this difference is, that there is a power of selecting witnesses to complete the solemnity of acts; whereas no persons can be brought to depose upon a matter of fact, but those who have a knowledge of it.

The causes of exception which may be proposed against a witness, so as to exclude his testimony, may be referred to four heads; want of reason—want of good fame—suspicion of partiality—and suspicion of subornation.

Of Want of Reason.

[789] It is clear, that the deposition of an infant child, and of a person out of his senses, ought to be rejected.

With respect to children approaching the age of puberty, and who consequently begin to have some use of reason, their depositions ought not to be indiscriminately rejected, but it ought to be left to the prudence of the judge, who may admit their evidence, when it is well connected, and the fact which they speak to is not beyond the reach of their judgment.

Those who pretend indiscriminately to reject the evidence of persons under the age of puberty, rely upon the law 3. § 5. ff. *de Test. (b)*, which excludes their evidence upon a capital charge of public violence; but I do not think that ought to be regarded as a general decision, and applied to civil questions.

(a) See Appendix, No. XVI. § 13.

(b) *Lege Julia de vi cavetur; Ne hac lege in rem testimonium dicere liceret, qui se ab eo, parente ejus liberaverit, quive impuberes erunt; quique judicio publico damnatus est, qui eorum in integrum restitutus non erit; quive in vinculis custodiae publica erit; quive ad bestias ut depugnet, se locaverit; quaque palam questum faciet, feceritque; quive ob testimonium dicendum pecuniam accepisse judicatus vel convictus erit. Nam quidam propter reverentiam personarum, quidam propter lubricum consilii sui, alii vero propter notam & infamiam vitæ suæ, non admittendi sunt ad testimonii fidem.*

Of the Want of good Fame.

[790] The depositions of those who are rendered infamous by any condemnation, ought to be rejected; this is taken for granted by the ordonnance of 1667, *Tit. 23. Art. 2.*

Not only the loss of a state of good fame, but even the suspension of that state, by a decret for the apprehension of a person, is a ground for rejecting his deposition; because for a witness to be worthy of credit, it is not sufficient that he should be free from crime, he must also be free from all legitimate suspicion.

It is the same also with respect to a decret of personal adjournment, when the accusation, from its nature, may induce an infamous punishment.

The ordonnance of 1667, in the article above cited, considers a decret as well as a condemnation as sufficient ground for the rejection of a witness (a).

Of the Suspicion of Partiality.

[791] The suspicion of partiality is a just cause of exception against the deposition of a witness; witnesses, to be worthy of full credit, ought to be entirely disinterested.

Upon this foundation, the depositions are rejected, 1, of those who have any personal interest in the decision of the cause, although they are not parties to it.

For instance, if in consequence of a commencement of proof, in writing, I am admitted to give parol evidence, that you have sold me a certain estate, the deposition of the lord, of whom the estate is held, ought to be rejected, because he has an interest in the decision of the cause, on account of the profits which would be due to him, if it should be adjudged that there was a sale.

[792] 2. Upon the same foundation we reject the depositions of witnesses, who are related to or connected with both, or either of the parties, as far as the fourth degree of collaterals inclusive. Ordonnance of 1666. *Tit. 22. Art. 11. (b)*

Observe, that relatives or connections of a party cannot depose in his favour, or even against him; kindred and alliance induce a suspicion of either amity or hatred, either of which is repugnant to impartiality; *sunt apud concordēs excitamenta charitatis inter iudicēs*

(a) A decret is the ordonnance of a judge, by which he cites the accused to answer the accusation against him.

A decret de prise de corps, answers to a warrant; a decret d'ajournement personnel, to a summons.

(b) Parentes et liberi invicem adversus se nec volentes ad testimonium admittendi sunt.

verò incitamenta odiorum. This is the reason assigned in the *procès verbal* of the ordonnance.

It appears by this *procès verbal*, that the disposition met with considerable opposition, and passed against the opinion of the first president and the other magistrates of the parliament. By the *Roman law*, only fathers and mothers and children were excluded giving evidence against each other. *L. 4. Cod. (a) de Test. L. 9. ff. b. tit. (b)* All collateral relations were admitted, except that in criminal accusations, relations to the degree of children of *second* cousins were not compellable to give evidence against their kindred. *L. 4. ff. d. tit.*

[793] Upon the same foundation we commonly reject the depositions of servants, or other domestics, of either of the parties. I say *commonly*, for the ordonnance does not contain an absolute prohibition of admitting these depositions, as it does with respect to relations, but contents itself with directing it to be mentioned at the head of each deposition, whether the witness was a servant or domestic of the parties, and then intimates, that it is left to the judge to act as he thinks proper, and to admit or reject the testimony, according to the different circumstances.

We call those *servants*, (*serviteurs*,) who have wages to do every thing which is ordered, without their being principally appointed to any particular kind of service.

Thus a person may be a servant without being a domestic, such as a gardener or gamekeeper, whom a person living in a town has at his country estate; they are not properly his domestics, as they do not live with him, but they are his servants, because he has them at wages, and may command them, when he is in the country, to render him all the services for which they may be qualified.

In this respect, these persons differ from those with whom we make a bargain to do a certain work for a certain sum, such as the persons usually employed in the culture of vineyards; they are not properly our servants, and we have no right to command them, or to require any thing else from them, than the work which they have engaged to do. Therefore, it is customary to admit the *vignerons* of either party as witnesses.

Domestics are those who reside in our house, and eat our bread, whether they are at the same time our servants, such as coachmen,

(a) *Lege Julia judiciorum publicorum cavetur, ne invito denunciatur, ut testimonium [litis] dicat adversus socerum, generum, vitricum, privignum, sobrinum, sobrinam, sobrino, natum eoque qui in priore gradu sint.*

(b) *Testis idoneus pater filio, aut filius patri non est.*

footmen, cooks, &c. or whether they are not properly servants, such as apprentices, clerks to procureurs, &c.

The depositions of servants or domestics are more particularly rejected, when they are examined for and at the request of their masters; for this purpose, it is usual to cite the law 6. *ff. de Test.* which says, *idonei non videntur esse testes, quibus imperari potest ut testes fiant*; this law, however, is not perfectly applicable; it was intended for slaves, and for sons under the authority of their father, who were subject to a power from which they could not withdraw themselves (a); whereas servants with us are free persons.

Upon the same foundation of a suspicion of falsehood, the evidence of the advocate, or procureur of either of the parties, ought not to be admitted. *L. 25. (b) ff. de Test.*

Their testimony would be liable to the suspicion of partiality, if they were witnesses in favour of their parties, and there would be an indecency in admitting them as witnesses against them.

For the same reason a tutor, or curator, who in that quality is a party on behalf of his minor, or interdict, cannot be a witness for or against him. Administrators of hospitals, and other persons in similar situations, cannot be witnesses for or against the hospitals, &c.

But the relations, and even the children of those who are only parties in the qualified character of tutors, or curators, or administrators, and likewise their servants and domestics, may be witnesses: for these persons are not properly parties, but the minor, the interdict, or the hospital, are the parties by their ministry.

For the same reason, when a body corporate is party, the members of it ought not to be received as witnesses; their testimony would be suspected of partiality, if they were witnesses for the community, and it would be indecent to oblige them to be witnesses against it.

But as every member of such a community is a person distinct from the community, according to the rule, *universitas distat a singulis* 7. § 1. *ff. quod cui univ.* there is no objection to the relations or domestics of any such member being admitted as witnesses, where the community is a party.

[795] 5. The suspicion of partiality is in general a sufficient cause for rejecting the depositions of witnesses, who are engaged in any process with the party against whom they are produced. The reason is, that it rarely happens that any litigation is

(a) The original passage strongly marks the difference between the terms puissance and pouvoir. "Qui étoient soumis à une puissance à laquelle il n'étoit pas en leur pouvoir de se soustraire."

(b) *Mandatis cavetur, ut præfides attendant, ne patroni in causa, cui patrocinium præstarent, testimonium dicant. Quod et in executoribus negotiorum observandum est.*

carried on without some bitterness, and that law-suits usually excite a spirit of enmity between the litigant parties.

As criminal procedures more especially excite great enmities, it is clear that the deposition of a witness ought to be rejected, who is the accuser in a criminal process against the party, against whom he is produced. This is conformable to the *novel* 90. c. 7.(a) With respect to civil suits, I do not think that they ought to be indiscriminately regarded as a sufficient cause of exception; if that had been the intention of the legislator, he would have expressed it, as he has done with respect to kindred and connections; from his not having done so, it is to be presumed, that he intended to leave it to the prudence of the judge, to admit or disallow the exception, according to circumstances. For instance, he will admit the exception, if the suit is one which involves the whole fortune of the party, *lis de omnibus bonus*; for the animosity resulting from a cause is generally in proportion to the magnitude of the interest. The exception ought also to be admitted, if the cause in which the witness is engaged, though not important in point of value, is one which attacks the good name or probity of a party; but when a cause is of trifling consequence, if the probity of the parties is not at all called in question by it, if it only turns upon mere questions of legal right, I do not think it ought to be considered as a sufficient exception. Such causes are not in their nature calculated to produce enmity, and if they excite any heat, it is but in a slight degree; and it would be judging unfavourably of mankind, to suppose that a trifling warmth in a witness against a party could alter the sincerity of the testimony which he gives, under the sanction of an oath.

The judge ought, above all, to see whether the cause in which a party is engaged with a witness, produced against him, and which he would urge as an exception, is not an affected process, instituted at a time when he foresaw that the testimony of the witness would be offered, and with a view of opposing it, as an exception; when that appears, the judge ought not to pay any regard to the exception.

If the party has seized and taken in execution the property of a witness produced against him, that is also a cause of exception, for the same reason as a process between them, since it has a still greater tendency to excite a spirit of animosity.

(a) Si vero quis dicat odiosum præsentem ad testimonium sibi constitutum, et approbaverit statim quoniam criminalis inter eos lis movetur: non adfit ad testimonium quis usque adeo infestus est, donec de crimine judicetur. Si vero aliter odiosus esse dicatur, aut conventus pecuniarie: procedat quidem testatio, tempore vero disputationum serventur hujusmodi questiones.

Of Suspicion of Subornation.

[796] A legitimate suspicion of subornation is also a just cause of exception, for which the deposition of a witness ought to be rejected; there is cause for such suspicion, and the deposition of the witness is rejected, when it is proved and acknowledged that the party who produces him has, since the appointment for his examination, made him any present, or given him meat or drink at a tavern; but if the witness had only been at the tavern in company with the party, but at his own expence, this would be no ground of exception.

It is also a kind of suspicion of subornation, when it is proved that the party who produces the witness, had sent him his deposition in writing.

See the *arrêt*, 5th vol. of the *Journ.* cited by *M. Fousse*, upon Art. 1 of the said title, 23 of the ordonnance of 1667. (a)

C H A P. III.

Of Confession, Presumptions, and the Oaths of the Parties.

S E C T I O N I.

*Of Confession.**Confession is Judiciary or Extrajudiciary.*§ I. *Of Judiciary Confession.*

[797] A judiciary confession is the acknowledgment which a party makes before a judge, of a fact on which he is interrogated; and of which confession the judge gives an act, or written memorial.

The confessions or acknowledgments which the parties make, by acts of procedure signified in the course of an instance (b), may also be considered as a kind of judiciary confession when the procureur has a power from his party to make them; and he is deemed to have such power so long as it is not disavowed.

[798] A judiciary confession made by a person capable of being a party in a cause (*standi in judicio*) is full evidence of the fact acknowledged, and relieves the other party from making any proof of it. Therefore, if a debtor who is assigned for the payment of a debt, confesses himself to owe the sum demanded, the creditor is relieved from proving the debt, and may,

(a) In *Ambler* 252, a deposition was suppressed because the attorney for the plaintiff had written down the whole in the exact form of the deposition, before it was taken.

(b) In other words the pleadings of a cause.

upon this confession, obtain a judgment of condemnation; *vice versa*, if the creditor who has an engagement for his debt, makes a judiciary acknowledgment of the payments alleged by the debtor, these payments are regarded as certain facts, and the debtor is not under the necessity of proving them.

[799] Observe, that when I have no other proof than your confession, I cannot divide it. Suppose, for instance, that I claim from you 200 livres, which I allege that you have borrowed, and of which I demand the payment; you admit the loan, but add, that you have repaid it; I cannot found a proof of the loan upon your confession, which is at the same time a proof of payment, for I can only use it against you such as it is, and taking it altogether, *Si quis confessionem adversam allegat, vel depositionem testis, dictum cum sua quantitate approbare tenetur.* Bruneman (a), *ad L. 28. ff. de Pact.*

[800] The proof resulting from confession is not so decisive against the party who made it, but that it may be destroyed by shewing it to be founded on mistake; and in this respect, such proof is less than that which results from the presumption, *juris et de jure*, of which we shall treat in the following sections, and which excludes all proof to the contrary.

If, for instance, I claim from you a sum of 200 livres, which I assert that I lent your father, and the only proof that I produce is a letter from your father requesting such a loan, and upon this demand you acknowledge yourself to be my debtor for that sum, such confession is a proof of the debt against you, and whereas, previous to the confession, you might have been discharged from my demand without proving any thing, upon merely saying that you know nothing of the loan, and that the letter produced by me is not sufficient evidence of it; the contrary is now the case, and your confession is a sufficient proof to entitle me to a condemnation against you, unless you produce proofs that the loan was not made, and that you had acknowledged it by mistake; as if, for instance, you produce my letter in answer, stating that I could not advance the money, and affirm that you had only found it since your confession; the error under which you made the confession being made out by this letter, destroys your confession and the proof resulting from it; for as a consent founded upon error is not a real consent, according to the rule, *non videntur qui errant consentire.* *L. 116. §. 2. ff. de R. J.* so a confession founded upon error is not a real confession, *non fatetur qui errat.* *L. 2. de Confessis.*

Observe, that the error in a confession can only be taken advantage of, by proving some *fact* which has come to the knowledge

(a) See the observations on answers in Chancery, Appendix No. XVI. §. 4.

of the party, subsequent to the making of the confession, as in the case just supposed ; but the person who makes a confession cannot allege that he did so under an ignorance of law, for it is his own fault not to have informed himself of that before ; therefore, the law 2. above cited, after having said *non fatetur qui errat*, adds *nisi jus ignoravit* (a).

This distinction between error of law and error of fact will appear by the following example ; suppose a minor, being of sufficient age to make a testament, leaves a considerable sum of money to his preceptor ; the heir being assigned, confesses that he owes the preceptor the sum mentioned in the testament ; if the heir afterwards finds a codicil containing a revocation of the legacy, his confession occasioned by the ignorance of such codicil, which is an error of fact, is annulled ; but, if the legacy is not revoked, and he only alleges the confession to have been by error, because he was ignorant of the law which disallows the giving of legacies by minors to their preceptors, this being an error of law, cannot be propounded ; and the proof resulting from the confession will continue to subsist.

It remains to observe, that when a defendant, who has confessed himself to owe the sum demanded, wishes to prove the error of the confession ; if the proof of the facts by which he would evince such error requires a long discussion, the plaintiff may require him to be condemned, provisionally to pay the sum which he has confessed ; for until these facts are proved, the proof resulting from his confession subsists, and the effect of it ought to be provisionally allowed.

§ II. Of Extrajudiciary Confession.

[801] Extrajudiciary confession is that which is not made by any judicial act (*qui est fait hors justice*).

We do not mean to speak here of the confession which parties make of their obligations, by the act of contract in which they are contained ; or by acts of new title and of recognition, which are passed expressly for that purpose. We have treated of the credit given to such acts in the first chapter.

The confessions which we here speak of, are those which the debtor makes either in conversation or by letter, or which incidentally occur in some act not passed expressly for that purpose. *Dumoulin* distinguishes those confessions which my debtor makes to myself, from those made to a third person not in my presence.

When it is to myself that the debtor has confessed the debt, his confession is a complete proof of the debt ; but if it were made

(a) See Appendix, No. XVIII.

in a vague manner, and without expressing the cause, it forms, according to this author, no more than an imperfect proof which requires to be confirmed by the suppletory oath, which the judge ought to administer to me.

When the confession is made to a person who represents me, as my tutor or curator, or procureur, &c. it is the same thing as if it had been made to myself.

When it is made to a third person out of my presence, it is only an imperfect proof, which ought to be perfected by a suppletory oath; such are the distinctions made by *Dumoulin*, *ad L. 3. (a) d. de Rebus Credit.*

These principles of *Dumoulin* appear to me to require a distinction: when my debtor, after having admitted in an extrajudiciary manner that he owed me a certain sum, upon being assigned to pay it, denies having ever contracted such debt, the confession which he has already made convicts him of a falsehood, and establishes the proof of the debt of which I demand the payment, so that he cannot afterwards be allowed to allege without proof the sum that he had paid, which he had at first denied having ever owed.

But if upon being assigned he admits having once really owed me that sum, but insists that he has paid it; whether the confession was made to a third person or to myself, whether in a conversation or a letter, or in some other act not made for the purpose of serving as a proof of the debt, it will not be any proof that the money still remains due.

Observe with respect to what *Dumoulin* says, of a confession to a third person being only an imperfect proof of the debt, that there are certain cases in which it ought to make a complete proof.

Guthierrez, *de contr. jur. qu. 54. n. 5.* puts the case where a debtor, making an acknowledgment to a third person, says, he does it to discharge his conscience. For instance, if a man under the apprehension of approaching death, sends for two persons to whom he declares that he owes me a hundred livres, which I had lent him without any written acknowledgment; such a confession, though made to a third person, appears to me to be a competent proof of the debt.

When my debtor, in an inventory made upon the dissolution of a partnership, inserts on the debtor side of the account (*dans le passif*), the debt which he owes to me; this confession, although not made in my presence, ought also, I conceive, to be a complete proof of the debt.

If the extrajudiciary confession which the debtor makes of the debt, in the presence and at the request of the creditor, is a com-

(a) See this law, No. 829 p. 8.

plete proof of the debt, an extrajudiciary confession made by the creditor, in the presence and at the request of the debtor, is *a fortiori* a perfect proof of payment; for as the law favours liberation, it ought to be presumed more easily than obligation. It is the same if the acknowledgment is made by the creditor, in the presence of one who requests it on the part of the debtor, for this is in a manner making it in the presence of the debtor himself. *Guthierrez, ibid.*

There are even doctors cited by *Guthierrez*, who think that an extrajudiciary confession of payment, made by the creditor though in the absence of the debtor, is a complete proof of payment; but *Guthierrez* thinks it only makes an imperfect proof. It ought to depend a great deal upon circumstances.

[802] It is incumbent on the party who offers to prove the existence, or payment of a debt, by the confession of the opposite party, to make out such confession; which he may do either by writing or by witnesses. If, however, the fact which I would prove by your extrajudiciary confession, is a fact of which parol evidence is not admissible, I could not be admitted to give parol evidence of the confession. For instance, if I demand the restoration of a book, of the value of more than 100 livres, which I assert that I have lent to you, and I offer an allegation that you have admitted such loan in the presence of witnesses; I cannot be allowed to prove such confession by witnesses, because that would be indirectly admitting me to give parol evidence, of the loan of a thing of above the value of one hundred livres, which the ordonnance disallows.

[803] A confession can only be evidence against the person who has made it, if he has a capacity to oblige himself; the confession of a married woman not authorized, or a minor, is not any proof.

[804] Confession is a proof not only against the person who makes it, but also against his heirs; nevertheless, if a person confesses himself to owe a debt to another, to whom the law prohibits his making a donation, such confession will not be proof of the debt against his heirs, at least unless the cause of the debt appears to be well supported by the circumstances stated. This case falls within the maxim, *qui non potest donare non potest confiteri*.

[805] A tacit confession ought to have the same effect as one which is express. Therefore, as a payment is a tacit confession that a person owes what is so paid, it follows, that it is a proof against him that it was really due.

If, therefore, he would reclaim it as having been unduly paid, the person who received it is not called upon to prove that it was actually due; he has a sufficient proof in the tacit confession made by the
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the payment; it lies upon the party who made the payment to prove the mistake. This is the decision of law 25. ff. *de Probat* (a).

Nevertheless *Paulus*, whose law this is, states two exceptions to it; the first is, that if the person assigned to make restitution begins by denying the payment, which is afterwards proved, he ought to be obliged to prove that the thing paid was actually due. The reason of this exception is, that the presumption against the debt, which results from a denial of the payment, destroys the presumption in favour of it, resulting from the payment having in fact been made.

Paulus states a second exception in favour of minors, women, soldiers, and peasants. As such persons are easily taken advantage of, he holds it requisite that whoever receives any thing from them in payment, shall be bound to prove that the thing was really due. This exception does not appear to be one which should be indiscriminately admitted. It should depend very much upon circumstances.

SECTION II.

Of Presumptions.

[806] Presumption may be defined to be a judgment which the law, or which an individual makes respecting the truth of one thing, by a consequence deduced from another thing. These consequences are founded upon what commonly and gene-

(a) Cum de indebito queritur quis probare debet non fuisse debitum? Res ita temperanda est: Ut si quidem is qui accepisse dicitur rem, vel pecuniam indebitam, hoc negaverit et ipse qui dedit legitimis probationibus solutionem adprobaverit: sine ulla distinctione ipsum, qui negavit se se pecuniam accepisse, si vult audiri compellendum esse ad probationes præstandas, quod pecuniam debitam accepit, per etiam absurdum est, eum, qui ab initio negavit pecuniam suscepisse, postquam fuerit convictus eam accepisse, probationem non debiti ab adversario exigere. Sin vero ab initio confiteatur quidem suscepisse pecuniam, dicat autem non indebitas ei fuisse solutas, præsumptionem videlicet pro eo esse qui accepit, nemo dubitat. “Qui enim solvit nunquam ita resipiscit est, ut facile pecunias suas jactet et indebitas effundet,” et maxime si ipse qui indebitas dedisse dicit, homo diligens est, et studiosus paterfamilias cujus personam incredibile est in aliquo facile errasse, et ideo eum qui dicit indebitas solvisse compelli ad probationes quod per dolum accipientis, vel aliquam justam ignorantie causam indebitam ab eo solutum, et nisi hoc ostenderit, nullam eum repetitionem habere. § Sin autem is qui indebitum queritur vel pupillus vel minor sit, vel mulier, vel forte vir quidem perfectæ ætatis, sed miles, vel agricultor et forensium rerum expertus, vel alias simplicitate gaudens et desidie deditus; tunc eum qui accepit pecunias, ostendere bene eas accepisse, et debita ei fuisse solutas, et si non ostenderit, eas redhibere. § 2. Sed hæc si totam summam indebitam fuisse solutam is, qui dedit, contendat. Sin autem pro parte queritur, quod pars pecuniarum solutarum debita non esset; vel quod ab initio debitum fuit, sed vel dissoluto debito, postea ignarus iterum solvit, vel exceptione tutus, errore ejus, pecunias dependit: ipsum omnimodo hoc ostendere, quod vel plus debito persolvit, vel jam solutam pecuniam per errorem repetita solutione dependit, vel tutus exceptione suam nesciens projecit pecuniam, secundum generalem regulam quæ, “*omnes qui opponendos esse exceptiones adfirmant, vel solvisse indebita contendunt, hæc ostendere,*” exigit.

rally takes place : *presumptio ex eo quod plerumque fit. cujac : in parat. ad tit. cod. de probat. et pres.*

For instance, the law presumes, that a debt has been paid when the creditor has returned the debtor his note, because a creditor does not commonly and ordinarily return the note to a debtor, until after payment.

Alciatus says, that the term presumption is derived from *sumo* and *pra*, because *sumit pro vero habet pro vero*, it takes a thing to be true, *PRÆ id est ante aliunde probetur*, without any other proof being requisite.

Presumption differs from proof properly so called ; the latter attests a thing directly and of itself ; presumption attests it by a consequence deduced from another thing. This may be illustrated by examples : the credit which is given to an act, purporting to be an acquittance on the payment of a debt, is a written proof of such payment ; the credit which is given to the depositions of witnesses, who have seen the creditor receive from his debtor the sum due to him, is a parol proof of payment ; for the acquittance and depositions directly and in themselves attest the fact of payment. But the evidence which acquittances for rent, for the last three years, afford of the rent for the preceding years having been paid, is a presumption ; because these acquittances establish the fact, not directly and in themselves, but by an inference of the law, established upon the considerations of its being usual to pay the preceding rent, before the subsequent.

There are, with respect to obligations, different kinds of presumptions : some are established by law, and are called presumptions of law ; others not established by any law, are called simple presumptions ; of the presumptions of law, some are called *presumptiones juris et de jure*, others simply presumptions of law, *presumptiones juris*.

§ I. Of Presumptions, juris et de jure.

[807] Presumptions *juris et de jure*, are those which are such absolute proof as to exclude all evidence to the contrary.

Alciatus defines a presumption *juris et de jure* as follows : *est dispositio legis aliquid presumentis, et super presumpso tanquam sibi comperto statuentis*. It is, says *Menochius*, *tr. de pres. L. 1. 9. 3.* called *presumptio JURIS*, because *a lege introducta est*, *ET DE JURE*, quia super tali presumptione *lex inducit firmum jus, et habet eam pro veritate*.

[808] These presumptions *juris et de jure*, amount to more than written or parol proof, or even than confession.

Written as well as parol proof, may be overturned by proof to the

the contrary; it does not preclude the person against whom it bears, from being allowed to offer contradictory proof, if he can.

For instance, if a person claiming from me a hundred livres, which he alleges himself to have lent me, produces an obligation before a notary by which I acknowledge the loan; the written evidence arising from this obligation may be destroyed, by an opposite proof which I am not precluded from making, if I can; as by producing a counter-letter, acknowledging that I have not received the sum mentioned in the obligation.

It is the same with respect to confessions, though made *in jure*. We have seen in the preceding section, that the proof which results from these may be destroyed by an opposite proof, of its having been made by mistake.

On the contrary, presumptions *juris et de jure* cannot be destroyed; and the party against whom they operate, is not admitted to prove any thing in opposition to them, as we shall see in the following sections.

The principal kind of presumption *juris et de jure*, is that which is founded on the authority of *res judicata*: this requires to be treated at length, which will be done *ex professo*, in the next section.

The presumption arising from the decisory oath is also a kind of presumption *juris et de jure*, of which we shall treat, with other oaths, in the fourth section.

§ II. Of Presumptions of Law.

[809] Presumptions of law (*de droit*) are also established upon some law (*loi*), or by argument from some law, or equal authority (*quelque loi, ou texte du droit*), and are therefore called *presumptiones juris*; they have the same credit as a proof, and render it unnecessary for the party in whose favour they operate to make any proof of his demand or defence; but they differ from presumptions *juris et de jure*, since they do not exclude the party, against whom they militate, from being admitted to prove the contrary; and if he succeeds in doing so, he destroys the presumption.

[810] When two persons of the same province, the custom of which authorizes a community of property between husband and wife, intermarry, it is a presumption of law, that they have agreed to have such a community as the custom admits; the wife, therefore, who demands from the heirs of the husband, her share of the property which he has acquired, has no occasion to offer any proof of such agreement.

This presumption is established by the dispositions of the customs, which import that husband and wife are one and common, &c. (*uncti communis, &c.*) : for it is the same as if they had said, that it should be presumed that they had agreed to become one and common, &c. and it is founded upon its being customary in such province, for persons on their marriage to agree, that there shall be a community, from which the law deduces the inference, that parties who marry, without saying any thing upon this subject, should be presumed to have tacitly made such an agreement, *presumptio enim ab eo quod plerumque fit* : but this presumption not being *juris et de jure*, does not exclude the proof of a particular agreement to the contrary.

[811] It is also a presumption of law, in our city of *Orleans*, that the walls which separate contiguous properties, are common to the neighbours on both sides, to the height of seven feet from the ground.

The party who would rest any thing upon such wall, cannot be prevented by his neighbour from doing so, and he is not obliged to give any evidence of his right of community, which is sufficiently supported by the presumption established by the custom ; but this presumption may be destroyed by the neighbour adducing proof, that the wall belonged exclusively to himself.

[812] The law 3 *Cod. de Apoch. Publ.* (a) contains also a presumption of law ; it provides that a person, who has acquittances for the tributes of three successive years, shall be presumed to have paid for the time preceding. Although this law relates only to tributes, the decision of it has been extended to arrears of rents, whether seignoral or on lease, and other annual payments, *nam ubi eadem ratio, idem jus statuendum est*. This decision is founded upon the reason, that as it is common to demand those debts first which are of longest standing, a repeated payment of the subsequent debts should induce a presumption of having paid the preceding ; it is also founded upon the assistance which ought to be given to debtors, by not obliging them to keep too many acquittances, or to keep them for too long a time, lest any of them may be lost. *Perez ad. d. Tit. Cod.*

There are some who go so far as to say, that the acquittance for a single year induces a presumption of having paid for all the preceding ; but this opinion does not appear to be authorized.

(a) *Quicumque de provincialibus et collatoribus, decurso posthac quantolibet annorum numero, cum probatio aliqua ab eo tributarie solutionis exposcitur, si trium coherentium sibi annorum apochas securitatesque pretulerit, superiorum temporum apochas non cogatur ostendere, neque de præterito ad illationem functionis tributarie coerceatur, nisi forte aut curialis, aut quicumque apparitor, vel optio, vel actuarius, vel quilibet publici debiti exactor vel compulsor possessorum vel collatorum habuerit cautionem, aut id quod reposit debet sibi, manifestâ gestorum adsertione patefecerit.*

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This presumption only takes place, when the arrears of the preceding years are due to the same person, who has given the acquittance for the succeeding, and by the same person to whom the acquittances were given; there are also other exceptions. See what we have said on this subject, in the treatise on the *Contract of Hiring, (Louage,)* Part III. c. 1. Art. III. (a)

This presumption, not being *juris et de jure*, does not exclude the creditor, against whom it operates, from proving that the former arrears are still due; and that, since receiving the acquittance for the three last years, the debtor has acknowledged the former arrears to be unpaid.

[813] The law 2. § 1. *ff. de Pact.* furnishes us with another example of a presumption of law. This law presumes that a debt is acquitted, when the creditor returns the debtor his note; the presumption is founded upon its not being either customary or probable, that a creditor should return the note before the debt was acquitted; but not being *juris et de jure*, it does not exclude the creditor from proving that the debt has not been paid. We have spoken of this presumption *supra*, n. 572.

The presumption of payment, which arises from the note being crossed, *chirographum cancellatum*, is similar to the preceding. It is a presumption of law, founded upon its being an ordinary sign of payment, when a note appears to be crossed, and the debtor is excused from giving other proofs of payment; but this presumption may be destroyed by the creditor proving that the note was crossed by mistake, and that the debt was not really paid; *L. 24. ff. de Probat.* (b) as if the creditor produced a letter from the debtor in these terms: "I return you the note of my late father which you sent me crossed, upon my promise to discharge it, which I am much distressed (*Je suis au desespoir*) that it is not in my power to perform," &c.

(a) In the passage referred to, the same principles are stated rather more at length. The other exceptions there mentioned are, that the receipts of the annual officers of a public company (*l'abriciers d'une fabrique*) are no presumption of payment having been made for former years to their predecessors, as they have more interest in procuring the payment of what accrues in their own time: and that if *A.* and *B.* are tenants *in solido*, and *A.* agrees with *B.* to pay the future rent; *B.* agreeing to pay the arrears then due, a receipt to *A.* for the three subsequent years, and given for his accommodation in expectation of obtaining the former arrears from *B.*, will be no bar to a subsequent demand of those arrears from *A.*

It is added, that the presumption alluded to, only applies when there are three separate acquittances for different years, and not when there is only one acquittance for three years together.

(b) *Si chirographum cancellatum fuerit, licet presumptione debitor liberatus esse videtur, in eam tamen quantitatem quam manifestis probationibus creditor sibi adhuc deberi ostenderit, recte debitor convenitur.*

[814] The presumption of payment, or release of the seignioral profits on alienation, which arises from accepting the performance of fealty, without making any reservation, is another kind of presumption of law; it is established by the 66th Article of our custom of *Orleans*, and is founded upon its being customary for the lord to make such a reservation when he has not received his profits, and does not intend to remit them; this presumption excuses the vassal from making any other proofs, or producing any acquittance for the payment of the profits; but it does not exclude the lord from proving that the profits are still due, as, by letters in which the vassal acknowledges himself to be indebted for them.

Many other examples might be adduced, but those which we have mentioned will be sufficient.

§ III. Of Presumptions not established by any Law.

[815] There are some presumptions, which, without being established by any law (*loi*), are sufficiently strong to have the same credit as presumptions of law (*droit*), saving a right to the party against whom they militate to make proof to the contrary. The following is a common example: when a party disavows a procureur, who has taken possession for him, upon a demand, (*qui a occupé pour elle sur une demande*) if the procureur is in possession of the process upon which the demand is made (*l'exploit de demande*), and the officer who served the process is not disavowed, this process in the possession of the procureur is a presumption in his favour, equivalent to the proof of a mandate, and is a sufficient ground to over-rule the disavowal.

The presumption is still stronger, if the procureur is also in possession of the titles of the party, upon which the demand is founded, and the presumption arising from these titles also precludes the party from disavowing the officer; so, when the procureur of the defendant is in possession of the titles of his party, which were used as a defence in the cause, these titles are a proof of the employment of the procureur.

These presumptions relieve the procureur from giving any other proofs of his mandate; but they do not exclude the party, making the disavowal, from proving, if he can, that he did not authorize the procureur to take the possession; as if he were to produce a letter from the procureur in these terms: "*I have received the titles which you sent me, for the purpose of consulting our advocate: I shall do nothing without your orders.*" Such a letter, which establishes that the titles were only sent for the purpose of consultation, and by which

which the procureur submits to wait for directions, previous to forming a demand, destroys the presumption arising from his possession of the title.

Observe with respect to officers, that their having possession of the titles, is a very sufficient presumption of their authority, to make a common assignation or commandment; but it is very dangerous from thence to establish a presumption of the like authority for seizures, executions, and sales; because we every day see officers taking advantage of a writing which is placed in their hands to make a commandment, and, contrary to the creditor's intention, making seizures, the expence of which is ruinous to the debtor, and sometime also to the creditor.

The other presumptions, which we call simple, do not alone and by themselves form any proof; they only serve to confirm and complete the proof which is otherwise given.

[816] Some times, however, the concurrence of several of these presumptions united is equivalent to a proof. *Papinian*, in law, 26. ff. (a) *de Probat.* gives the following example: A sister was charged with the payment of a sum of money to her brother; after the death of the brother, there was a question, whether this was still due to his successor; *Papinian* denied that it ought to be presumed, that the brother had released it to his sister, and he founded the presumption of such release upon three circumstances; 1st, From the harmony which subsisted between the brother and the sister; 2d, From the brother having lived a long time without demanding it (b); 3d, From a great number of accounts being produced which had passed between the brother and sister, upon their respective affairs, in none of which there was any mention of it. Each of these circumstances, taken separately, would only have formed a simple presumption, insufficient to establish that the deceased had released the debt; but their concurrence appeared to *Papinian* to be a sufficient proof of such release.

(a) *Procula*, magnæ quantitatis fideicommissum a fratre sibi debitum, post mortem ejus in ratione cum heredibus compensare vellet, ex diverso tamen allegaretur nunquam id a fratre, quamdiu vixit, desideratum, cum variis ex causis sæpe [in] rationem fratris pecunias ratio *Proculæ* solvisset. Divus Commodus cum super eo negotio cognosceret, non admisit compensationem, quasi tacite fratri fideicommissum esset relictum.

(b) I do not think either of these two grounds sufficiently appears from the law itself; which does not state any thing of the harmony between the parties, or necessarily imports a great length of time.

SECTION III.

Of the Authority of Res judicata (a).

The particular kind of presumption, *juris et de jure*, which results from the authority of *res judicata*, appeared to merit a separate discussion in this section.

We shall see, 1st, What judgments have the authority of *res judicata*; 2d, What judgments are null, and consequently cannot have that authority; 3d, What is the authority of *res judicata*; 4th, With respect to what things it operates; 5th, Between what persons.

ARTICLE I.

What Judgments have the Authority of Res judicata.

[1] A judgment to have the authority, or even the name of *res judicata*, must be a definitive judgment of condemnation or dismissal, *RES JUDICATA dicitur quæ finem controversiarum pronuntiatione judicis accipit, quod vel condemnatione vel absoluteione contingit, L. 1. ff. de rejudic.*

A provisional condemnation then cannot have either the name or the authority of *res judicata*, for although it gives the party obtaining it a right to compel the opposite party to pay, or deliver provisionally the money or things demanded, it does not put an end to the cause, or form a presumption *juris et de jure*, that what is ordered to be paid or delivered is due, since the party condemned, after satisfying the provisional sentence, may be admitted in the principal cause, to prove that what he was ordered to pay is not due, and consequently to obtain a revocation of the judgment. *A fortiori* interlocutory sentences, or *arrêts*, cannot have the authority of *res judicata*.

[2] The ordonnance of 1667, *L. 27. Art. 5*, specifies three cases, in which definitive judgments have the authority of *res judicata*. It is there said, "Sentences, and judgments having the authority of *res judicata*, are those which are given in the last resort or not appealed from; those against which an appeal is not receivable, either because the parties have formally acquiesced, or

(a) This section not being in the first edition, is distinguished by a separate series of numbers.

'because the appeal has not been made within the limited time, and those the appeal from which is declared to be extinct (*peri*)."

We shall treat separately of these three cases.

First Case.

Of Judgments in the last Resort, or not appealed from.

[3] The ordonnance in this article, couples judgments from which no appeal has yet been made, with those in the last resort, because until such appeal they have a kind of authority *res judicata*; similar to that of judgments in the last resort, which gives the party, in whose favour they are pronounced, a right of carrying them into execution, and form a presumption *juris et de jure*, against the other party, which precludes him from alleging any thing in contradiction of them; but this authority, and the presumption derived from it, are only momentary, and cease as soon as an appeal is made.

This is the case even where the sentence ought to be executed provisionally, notwithstanding the appeal, for such execution only gives the sentence the effect of provisional judgments, which as we have already mentioned have not the authority of *res judicata*.

[4] With respect to judgments in the last resort, such as the *arrêts* of the supreme courts, and in certain cases the sentences of presidial and consular judges; they have when definitive a stable and perpetual authority *res judicata*.

When the judgment in the last resort is contradictory, (that is when it is given after the appearance of the defendant,) it has this authority, as soon as it is given; but when it is by default, the party against whom it has passed, is allowed eight days from the signification of it to his procureur, or if he has not appointed any procureur, to himself, or at his domicil, to form an opposition. This opposition destroys the effect of the judgment; therefore, judgments by default do not acquire a stable and perpetual authority *res judicata*, until the eight days are expired.

[5] *Arrêts*, and judgments, in the last resort can never be questioned, by the ordinary mode of appeal, but *arrêts* may be so in certain cases, by the extraordinary course of *requête civile*.

Presidial judgments in the last resort, may also in the same cases be impeached, by a *requête* of opposition which is likewise an extraordinary proceeding, and only differs from a *requête civile*, in not requiring the same formalities, such as making a deposit agreeably to the 16th article, of the last title of ordonnance of 1667; and

annexing a consultation, or certificate of the opinion of ancient advocates, according to the 13th article.

As these *requêtes* do not stay the execution of *arrêts*, and judgments in the last resort, (art. 18.) and the party cannot oppose any exceptions to the judgment, except those which are the foundation of the *requête*, and cannot impeach it on the merits, Art. 31. 37, it follows, that *arrêts* and judgments do not, by being subject to such *requêtes*, lose the authority of *res judicata*; but this authority is not stable and perpetual, since it may be destroyed by the rescission of the judgment; it only becomes so when the time for the *civile requête* has elapsed, or when the *requête* has been dismissed, as it cannot be repeated, Art. 41.

[6] The ordonnance expresses the different cases, in which a *civile requête* is admitted, it makes a distinction between minors, and persons of full age, between private individuals, and the church.

The causes for which individuals though of full age, are allowed the benefit of a *civile requête*, are contained in the 34th Art. of Tit. 35; it is there said; "*persons of full age shall not be allowed the benefit of civile requête, except in the following cases,*" 1st, *Personal fraud*.

That is to say, when the party in whose favour the judgment was given, used some deceit and artifice to obtain it, as by suppressing decisive writings, or adducing false writings, as will be mentioned hereafter.

2d, *If the procedure directed by us [viz. the king] has not been followed; this vice renders the judgment null.*

3d, *If judgment has been given upon things not demanded, or not contested, or if more has been adjudged than was demanded.* This is also a vice which renders a judgment null, and of which we shall speak in the following article.

4th, *If the court has omitted to pronounce respecting any of the subjects in demand.*

5th, *If there is a contrariety between arrêts or judgments, in the last resort between the same parties upon the same grounds, and in the same courts or jurisdictions; saving in case of contrariety between different courts or jurisdictions, the right of obtaining relief in our grand council.*

6th, *If in one and the same arrêt, there are contrary dispositions.*

7th, *If judgment has been given upon false writings.*

Observe, it is not sufficient to rescind a judgment, that the party in whose favour it has been given, may have produced false writings, it must appear that they were the foundation of the judgment,

ment, *causa judicati in irritum non devocatur ; nisi probare poteris eum qui judicaverat, secutus ejus instrumenti fidem quod falsum esse constiterit, adversus te pronunciaffe, L. 3. Cod. si. ex Fals. Instr.*

It is also necessary, that the writings should not have been contested as false, in the procedure upon which the judgment has been given ; for in this case, the truth or falsity would be a question already decided by the judgment, and which consequently could not be renewed ; as Mr. *Fouffe* has properly observed in his Commentary upon this article.

But although the party applying to be relieved by *civile requête*, may by mistake have admitted the truth of the writing, of which he now alleges that he discovered the falsity, he is not debarred from impeaching it, and the judgment founded upon it. *L. 11. ff. de Excep. (a)*

8th, *Or upon offers or consent which have been disavowed, and the disavowal adjudged to be well founded.*

If my procureur has given a consent, or made offers upon which I have been condemned, and I deny that I have given him authority to make such offers, I may be relieved by *civile requête* ; for this purpose I must make a formal disavowal of my procureur, and obtain a judgment declaring the disavowal to be well founded.

9th, *Or if there are decisive writings newly discovered, and kept back by the other side.*

This is an instance of personal fraud, in the party in whose favour the judgment was given, and affording ground for a *civile requête*, as has been already mentioned.

The recovery of these writings is not alone sufficient as we shall see *infra*, Art. 3. The ground of relief is the suppression of them, by the opposite party.

[7] When the *arrêt* is against minors, the church, or communities, there is another ground for *civile requête*, besides those which have been mentioned ; that is, if they have not been defended, or not been defended properly (*valablement*), Art. 35.

These terms ought to be interpreted by the plan of the Article 36 ; which appears in the *proces verbal*, of the ordonnance, p. 463.

(a) Qui adgnitis instrumentis, quasi vera essent, solvit post sententiam judicis : quæro, si post, cognita rei veritate, et repertis falsis instrumentis, accusare vetit, et probare falsa esse instrumenta, ex quibus conveniebatur, cum instrumentis subscripserat ex præcepto, sive interlocutione judicis, an præscriptio ei opponi possit ? cum [&] Principalibus Constitutionibus manifeste cavetur, *et si res judicata esset ex falsis instrumentis, si postea falsa inveniuntur, nec rei judicatae præscriptionem opponi.* Modestinus respondit : ob hoc, quod per errorem solutio facta est, vel cautio de solvendo interposita proponitur ex his instrumentis, quæ nunc falsa dicuntur, præscriptioni locum non esse.

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where it is said, "the above provisions shall extend to ecclesiastics, to communities, and minors. And we also allow them the benefit of a *civile requête*, if they have not been defended; that is to say, if the *arrêts* or judgments in the last resort, have been given by default, or foreclusion; if they have not been properly defended, in case the principal points of defence, in fact, or law, have been omitted, although the *arrêts* or judgments were contradictory, or upon the hearing of the parties, so however, that it shall appear that they were not defended, or were not properly defended, and that the omission of the proper defence has been the cause of the judgment."

The *proces verbal*, contains an approbation of this plan. Hence it follows, that it was only retrenched, *brevitatis et compendii studio*, because every thing which it imports, was held to be sufficiently comprized under the general terms.

Observe, that the church is always presumed not to have been sufficiently defended, unless the affair was communicated to the legal officers of the crown; the 34th Article makes the want of this a cause of *civile requête*.

Observe also, that the church has these rights only, with respect to the substance of its domain, *arrêt* 27 November, 1703, reported in the *Journal of Audiences*. *Jorn.* 3; when the matter only concerns the current revenues, it is considered as the cause rather of the incumbent than of the church.

[8] When the party against whom the *arrêt* has been given, is intitled to a *civile requête*, in any of the above cases; he ought to institute the necessary proceeding for that purpose, within six months, after the signification of the *arrêt*, made subsequent to his attaining his majority, Art. 5.

If he dies within that time, his heirs have a new six months from the time of a new signification, and if they are minors, the time only runs from a signification after their majority.

The church, and communities, as well lay, as ecclesiastical, and private individuals, who are out of the realm, on the public service, have a year from the signification of the *arrêt*, Art. 7.

If the incumbent of a benefice dies within the year, the successor has a further term of a year, from the signification of the *arrêt*, Art. 9. a person coming in upon resignation, has only the remainder of the term allowed to his predecessor, and is not entitled to any new signification, it being presumed that he has been apprized of the *arrêt* by the predecessor.

[9] When the *requête* is founded upon the falsity of writings, or upon writings being newly discovered, the term of six months,

months, or a year, only begins to run from the time of the discovery; provided, says the ordonnance, Art. 12, *there are proofs in writing, and not otherwise.*

It is not sufficient then after the expiration of ordinary term, to say, that I only lately discovered the forgery or the existence of the writing; I must also have a proof in writing of the time of discovery.

For instance, if the party in whose favour the *arrêt* was given, dies several years afterwards, and it appears by the inventory of his sealed papers, that the writing which had been suppressed is found amongst them; this is a proof in writing, that the discovery was made at the time of exhibiting the inventory.

So if the party in whose favour the *arrêt* has been given against me, produces the same several years afterwards in another process, it which it is adjudged to be forged, the judgment declaring it to be so, will be a proof in writing of the time of the forgery being discovered.

[10] The causes for which redress may be obtained by *requête*, against *prejudicial* judgments given in the last resort, are the same as those for which a similar relief may be obtained against *arrêts* (a).

With respect to the time within which the application must be made, the only difference is, that instead of having six months, in the case of private individuals; and a year in the case of the church, of communities, and persons absent, *reipublica causa*, the time is limited to three months in the one case, and to six months in the other.

§ II. *Second Case.*

Of Judgments from which the Appeal is no longer receivable.

[11] The ordonnance in enumerating the judgments, which have the force of *res judicata*, and which consequently form the presumption *juris et de jure*, whereof we are treating, mentions, in the second place, those from which an appeal is no longer receivable.

It mentions two circumstances, on account of which the appeal can no longer be received, the first is when the parties against whom the judgment has been given, have formally acquiesced in it.

The ordonnance by the term *formally*, does not mean that in order to exclude the party from his appeal, it is requisite that he

(a) The term *arrêts* is confined to the judgments of the parliament.

where it is said, "the above provisions shall extend to communities, and minors. And we also allow fit of a *civile requête*, if they have not been defended, if the *arrêts* or judgments in the last resort, default, or foreclusion; if they have not been in case the principal points of defence, are omitted, although the *arrêts* or judgments upon the hearing of the parties, so that they were not defended, or we that the omission of the proper defence judgment."

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(a) Illud sciendum esse, eum qui provocavit, non debere conviciari ei a quo appellat; ceterum oportebit eum plecti, et ita Divi Fratres rescripserunt.

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App. L. 1. § 11, 12, 13. ff. quand.

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et palam est, eam fuisse propriam causam, cujus emolumentum vel damnum ad
suo nomine pertinet. § 11.

Quare procurator nisi in suam rem datus est, tertium diem habebit: in suam autem rem
atus, magis est, ut alterum diem observet, ut si in partem proprio nomine in partem [pro]
alieno litigat, ambigi potest, utrum biduum an triduum observetur, et magis est ut suo
nomine biduum, alieno triduum observetur. § 12.

Tutores, item defensores rerum publicarum, et curatores adolescentium, vel furiosi ter-
tium diem habere debent, idcirco quia alieno nomine appellant. Ex hoc apparet, tertio
die provocandum defensori, si modo quasi defensor causam egit non suo nomine: cum ob-
tentu alieni nominis suam causam agens tertio die appellare potest.

(c) Dies autem istos, quibus appellandum est, ad aliquid utiles esse oratio D. Marci vo-
luit, si forte ejus a quo provocatur, copia non fuerit ut ei libelli dentur; ait enim is dies
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should have acquiesced in the judgment in express terms, and have passed an act for the purpose, it only requires that the acquiescence shall be shewn in an unequivocal manner; therefore the party has applied for a term of payment, whether at the time of the judgment or afterwards, it is clear that he is from that time precluded from appealing; as that is an unequivocal mark of his acquiescence in the judgment. *Ad solutionem dilationem petentem acquiescente sententia manifeste probatur. L. 5. Cod. de Re. Jud.*—*a fortiori*, must he be deemed to have acquiesced, when he has entered upon payment, whether of the sum imported by the condemnation, or of the expences which are decreed against him, at least with the exception of those cases, where the sentence is subject to execution provisionally, and he has paid by constraint, protesting that he does so without prejudice to his right of appeal.

When the party who has acquiesced in the sentence, is in a situation which intitles him to obtain restitution against his acquiescence, on account of minority, fraud, or any other cause, the authority of *res judicata* is not conclusive and perpetual; but is destroyed by such restitution being obtained.

[12] The second cause for which an appeal is no longer receivable, is that the party has suffered the time within which it ought to be made to elapse.

Our laws differ very much with respect to this time, from those of *Rome*. By the *Roman* law, the party who conceived himself to be injured by the sentence, might appeal from it the same day, *viva voce* in open court. *Si apud acta quis appellaverit, satis erit si dicat appello. L. 2. ff. de Appell.*

Such an appeal being authorized by the law, the *Roman* magistrates were not offended at the party, who was dissatisfied with their judgment, pronouncing his appeal in their presence, provided it was done in a respectful manner, and without any expressions reflecting on the judge or his sentence. *L. 8. ff. de Apel. (a)*

When the party did not appeal on the day of pronouncing the sentence, the mode of appeal was by presenting a memorial to the judge, whose decision was appealed from; this memorial ought to contain the names of the appellant, and of the party against whom the appeal was made, the sentence and the grounds of complaint against it, and conclude with praying the judge to transmit letters which were called *apostoli*, before the judge of appeal. The party was only allowed two or three days for making this appeal, when he pro-

(a) Illud sciendum esse, cum qui provocavit, non debere conviciari ei a quo appellat; ceterum oportebit eum plecti, et ita Divi Fratres rescripserunt.

ceeded in his own name, or three days when he was only party in the qualified character of procurer, tutor, curator, or administrator. *L. 5. § 5. (a) ff. App. L. 1. § 11, 12, 13. ff. quand. App. (b)*

The only days included in this computation, were those on which the judge held a public audience, and which were called *utiles d.* *L. 1. § 7 (c). § 9 (d).*

Justinian, by his *Novel 23, cap. 1 (e)*, extended this time, and allowed an appeal to be made within ten days from the time of the sentence.

These principles of the *Roman* law, although very opposite to our own, appear very wise and well calculated to promote the tranquillity of society, by shortening litigation. The king of *Prussia* has adopted them in his code, and allows only ten days for appeal, agreeable to the provisions of the *Novel*. The party injured by the sentence suffers no prejudice from the shortness of this delay, it was in his power from the commencement of the process before the first judge, to foresee that he might lose his cause; and he had time

(a) Si quis ipso die, inter acta voce appellavit, hoc ei sufficit; sin autem hoc non fecerit, ad libello, appellatorios dandos biduum, vel triduum computandum est.

(b) In propria causa biduum accipitur. Propriam causam ab aliena quemadmodum discernimus? et palam est, eam fuisse propriam causam, cujus emolumentum vel damnum ad aliquem suo nomine pertinet. § 11.

Quare procurator nisi in suam rem datus est, tertium diem habebit: in suam autem rem datus, magis est, ut alterum diem observet, ut si in partem proprio nomine in partem [pro] alieno litigat, ambigi potest, utrum biduum an triduum observetur, et magis est ut suo nomine biduum, alieno triduum observetur. § 12.

Tutores, item defensores rerum publicarum, et curatores adolescentium, vel furiosi tertium diem habere debent, idcirco quia alieno nomine appellant. Ex hoc apparet, tertio die provocandum defensori, si modo quasi defensor causam egit non suo nomine: cum obtentu alieni nominis suam causam agens tertio die appellare potest.

(c) Dies autem istos, quibus appellandum est, ad aliquid utiles esse oratio D. Marci voluit, si forte ejus a quo provocatur, copia non fuerit ut ei libelli dentur; ait enim *is dies servabitur, quo primo adeundi facultas erit*. Quare si forte post sententiam statim dictam, copiam sui non fecerit is qui pronunciavit, ut fieri adsolet, dicendum est nihil nocere appellatori, nam ubi primum copiam ejus habuerit, poterit provocare. Ergo si statim se subduxit, similiter subveniendum est.

(d) *Adeundi autem facultatem* semper accipimus, si in publico sui copiam fecit; ceterum si non fecit, an imputetur alicui, quod ad domum ejus non venerit, quodque in hortos non accesserit & ulterius quod ad villam suburbanam? Magisque est ut non debeat imputari; quare si in publico ejus adeundi facultas non fuit, melius dicetur facultatem non fuisse adeundi.

(e) Sancimus omnes appellationes, five per se, five per procuratores, seu per defensores, vel curatores vel tutores ventilentur, posse intra decem dierum spatium à recitatione numerandum, iudicibus ab iis quorum interest offerri; five magni, five minores sint (excepta videlicet sublimissima prætoriana præfectura) ut liceat homini intra id spatium plenissime deliberare, five appellandum ei sit, five quiescendum: ne timore instante opus appellatorium frequenteretur, sed sit omnibus inspectionis copia, quæ indiscussos hominum calores potest refræquare.

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during the whole continuance of it, to deliberate upon the course which *he* would take in that event.

[13] According to the principles of the law of *France*, the party who considers himself injured by a sentence, unless he has done some act importing an acquiescence, or has been summoned to appeal or submit, has ten years, which begin to run from the signification of the sentence. Order of 1667, l. 27, art. 17.

Double this period (that is twenty years) is allowed to the church, to hospitals, colleges and communities, in suits relating to their domains; and this time also begins to run from the signification of the sentence. *Ibid.*

Long as these delays are, I have heard practisers say, that this disposition of the ordonnance was not always observed in the parliament of *Paris*, and that appeals have been sometimes allowed after the time was expired.

The party in whose favour the sentence has passed, may abridge these delays, by summoning the other party to appeal, if he thinks fit; but this summons cannot be made until the expiration of three years, in case the sentence is against private individuals; or six years, if it is against the church, or any community on account of their domains. Order 1667, d. tit. art. 12.

The effect of this summons is, that no appeal can be received after the expiration of six months, from the time of its being served.

If, before the expiration of three years, or six years, or six months, the party against whom the sentence has been given dies, or (if he is an ecclesiastic) resigns his benefice, his heir, or universal legatee, or successor, ought to have a year, from the expiration of the time, allowed to the person whom he has succeeded, and a summons ought to be served upon him at the end of this additional year, even where there has been already a summons to the deceased, or the predecessor, and the heir, or successor, will only have six months from the time of this summons. Art. 12, 13, 15.

These terms do not run against minors, but they run against persons out of the realm, even on the public service.

§ III. Of Judgments against which the Appeal is declared to be lost.

[14] The ordonnance places, thirdly, amongst judgments having the force of *res judicata*, those from which the appeal is declared to be lost.

The

The appeal is lost when it has been discontinued for three years, and a judgment has been obtained declaring the right of peremption to be acquired.

This judgment has the effect of a confirmation of the sentence appealed against, and gives it the force of a *res judicata*, as the appellant is precluded from renewing his appeal.

This is not attended with any difficulty, when the tribunal where the appeal was depending, is a tribunal in the last resort; the judgment of peremption being in that case a judgment in the last resort, gives the force of *res judicata* to the judgment, which is thereby confirmed. When the tribunal where the appeal was depending is not of the last resort, there may be an appeal to a superior tribunal, but upon this appeal the judges are only to examine whether the peremption was acquired, and if it appears to them that it was, they ought to confirm the sentence without enquiring into the merits of the original judgment; if, on the contrary, it is decided that the peremption was not acquired, the parties are referred back to the former tribunal to proceed upon the original appeal.

Appeals which are not contested may fall into peremption as well as those which are.

The assignation before the judge of appeal, though not followed up by any other proceeding, is in itself sufficient to render the appeal subject to peremption, and the party in whose favour the sentence was given, may, at the end of three years, from the service of the assignation, obtain a judgment of peremption. This was fixed by a regulation of the court, of the 28th of *March*, 1692.

When the assignation has been followed by any proceedings, the three years are only computed from the time of the last proceeding.

This term runs even against minors, saving their recourse against their tutors. *Bouchel*, in his *Bibliothèque verbo peremp.* states several decisions to that effect.

The term may be interrupted in several different manners, by the death of either of the parties, by their change of state, by the death of one of the procureurs, &c.

[16] Although the time has elapsed, the peremption is not acquired until there is a judgment declaring it to be so, and if after the expiration of the time, and before such judgment, there is any procedure on behalf of the party against whom the appeal was preferred, and he does not disavow his procureur, the peremption is destroyed, and cannot be opposed until the expiration of a further term of three years.

ARTICLE II.

Of Judgments which are null, and which consequently cannot have the Authority of Res judicata.

[17] There is a great difference between a judgment which is null, and one which is improper: a judgment is null when it is not according to the regular form of proceeding, *sententia injusta*; it is improper *sententia iniqua* when the judge has made a wrong decision; as by condemning a party to pay what he did not owe, or discharging him from the payment of what he did: an improper judgment, given according to the regular form, may have the force of *res judicata*, when it falls within any of the cases of the preceding article, and however unjust it may really be, it is to be regarded as equitable, and no proof can be admitted to the contrary.

On the contrary, a judgment which is null, and given contrary to the regular form of procedure, cannot have the authority of *res judicata*, at least unless the nullity has been cured.

A judgment may be null in respect either of what it contains, or of the parties between whom it has been given, or of the judge who has given it, or of the non-observance of the proper course of procedure.

§ I. *Of Judgments which are null in respect to what is contained in them.*

[18] A judgment is null when the object of the condemnation which it pronounces is uncertain, *sententia debet esse certa*, for instance, if a judgment were expressed in the following terms: "We condemn the defendant to pay the plaintiff what he owes him." It is evident that such a judgment would not have the authority of *res judicata*, and would be absolutely null; for what is due to the plaintiff not being specified, either in the judgment or in any act to which it refers, the judgment has no certainty, this is decided by the law, 3 *Cod. de Sent. quæ sine certâ quant.* "*Hæc sententia omnem debiti quantitatem cum usuris competentibus solve judicati actionem præstare non potest, cum apud judices ita demum sine certâ quantitate facta condemnatio autoritate rei judicæ censeatur, si parte aliquâ actorum certa sit quantitas comprehensa.*"

[19] It is not however necessary that the object of the condemnation should be expressed by the judgment; it is sufficient

ficient if it appear by any act to which the judgment refers. For instance, a judgment condemning the defendant to pay what is demanded from him, is valid, and may have the authority of *res judicata*, when the cause of the demand is expressed in the proceeding to which the judgment refers. *Cum judex ait, solve quod petatum est; valet sententia.* L. 59. § 1. ff. de Re Judicat.

[20] Neither is it necessary that the object of the condemnation should be liquidated, it is sufficient if it may become so by reference to experts; therefore a judgment which condemns the defendant to pay damages, or to indemnify the plaintiff, may have the authority of *res judicata*; although the amount of the damages, or of the indemnity, being as yet unliquidated, the object of the condemnation is not liquidated and certain; for it will become so by the estimation to be made by the experts. This is decided by *Alexander Severus*, "*Quamquam pecunia quantitas sententiâ non contineatur, sententia tamen rata est, quoniam INDEMNITATE reipublica prastari possit.*" L. 2. Cod. de sent. quæ sine certâ quant.

[21] 2. A judgment is null when the object of the condemnation is any thing impossible. *Paulus respondit, impossibile præceptum judicis nullius esse momenti.* L. 3. ff. Quæ sent. Idem respondit, ab ea sententia, cui pareri rei natura non potuit, sine causa appellari. d. l. § 1.

[22] 3. A judgment is null when it pronounces any thing which is expressly contrary to the law, "*si expressim sententia contra juris rigorem data sit.*" Si SPECIALITER (that is expressly) *contra leges, vel Senatus consultum, vel constitutiones fuerit prolata.* L. 19. ff. de Apell. *Cum contra sacras constitutiones judicatur, appellationis necessitas remittitur.* L. 1. § 2. ff. quæ sunt sine apell.

Observe, that the judgment is only null if it pronounces expressly against the law: if it declares that the law ought not to be observed; but if it merely decides that the case in question does not fall within the law, although in truth it does so, the judgment is not null; it is only improper, and consequently can only be avoided by the ordinary course of appeal: this is laid down by *Callistratus*, "*Quum, prolatis constitutionibus, contra eas pronunciat judex, eo quod non existimat causam de qua judicavit per eas juvari, non videtur contra constitutiones sententiam dedisse, ideoque ab ejusmodi sententiâ appellandum est, alioquin rei judicata stabitur.*" L. 32. ff. de re judicat.

Observe also, that judgments, which pronounced expressly against the laws, were, with the Romans, null *pleno jure*; with

us, relief must be obtained against them by an application to the Council, when it cannot be had by the ordinary course of appeal.

[23] 4. A judgment is null when it contains inconsistent and contradictory dispositions. For instance, an action is brought to recover from me an estate which I have purchased from you, whereupon I vouch you to warranty, the judgment dismisses the demand against me, and condemns you to pay me the price of the estate, with damages. These two dispositions are contradictory, and the judgment is null, and the demandant may, if it is a judgment in the last resort, be relieved by *civile requête*, upon the ground that the judgment is contradictory, and contains a disposition which, by condemning the person vouched to warranty, is inconsistent with the disposition which he complains of, as dismissing his demand. If he allows the time for a *civile requête* to go by, the judgment will against him acquire the force of *res judicata*, but I think that, although you have not had recourse to a *civile requête*, I can never put the judgment in execution with respect to you, because the dismissal of the demand against me is always repugnant to the condemnation against you, as it is contrary to good faith, that whilst I retain the property, I should demand from you the price of it.

[24] 5. A judgment is null, when it pronounces upon what is not in demand, or condemns a party to the payment of more than is demanded from him ; - for the judge is only to decide upon the demands which are brought before him, and therefore can only give judgment in respect of such demands. *Potestas judicis ultra id quod in judicium deductum est, nequaquam potest excedere. L. 18. ff. Comm. Div.*

[25] And in like manner a judgment is null when it dismisses the defendant from a demand in which he has acquiesced ; for in this case, as well as in the other, the judge has decided upon what was not submitted to him. The ordonnance of 1667, *tit. 35, art. 34*, has combined these two cases, by directing that a *civile requête* shall be allowed, when judgment is given upon what is not demanded or contested.

[26] These nullities, which arise from the judge having decided upon what was not submitted to him, do not operate *pleno jure* ; they ought to be taken advantage of, either by the ordinary course of appeal, when the judgment is not in the last resort, or by *civile requête* when it is ; and when the party has allowed the time for these to elapse, without impeaching the judgment, the nullities are cured.

§ II. *Of Nullities in respect of the Parties between whom Judgments are given.*

[27] A judgment, to be valid, ought to be given between persons capable of being parties in a judicial proceeding, or as it is expressed, of standing in judgment, "*quæ habent legitimam standi in judicio personam.*"

All procedures by, or against, persons incapable of being such parties, as well as the judgments founded upon such procedures, are *ipso jure* void.

[28] Persons incapable of being parties are, 1st. those who have lost their civil state, either by a condemnation to capital punishment, or by religious profession; nevertheless ecclesiastics who have left their cloisters to serve a benefice, such as *curés*, and regular canons, are deemed capable of being parties to a suit, either as plaintiffs or defendants; for although their benefice does not restore them to their civil state, nevertheless, as the administration of the revenues, and the right of the benefice, as well as their own provision from it, are committed to their charge, it is necessary that they should be enabled to be parties in judicial proceedings, respecting those revenues and rights, and in actions arising from penal obligations, contracted by them, or in their favour.

[29] Minors, who are under the authority of a tutor, are also incapable of being parties in a suit; the actions in which they are concerned can only be brought by their tutors, in the quality of tutor, and those against them can likewise only be brought against their tutor, in his quality as such, and not against themselves.

When the minor has not any tutor, a person who wishes to institute a proceeding against him, ought to present a memorial to the judge of the *domicil* of the minor, praying him to convene the relations of the minor, for the purpose of appointing a tutor, against whom the action may be brought.

When minors are emancipated, they may be parties themselves, but it must be with the assistance of a curator, who is to be named for that purpose by the judge, and ought to be included in the cause.

[-30] Women, under the authority of a husband, cannot, in the customary provinces, sue or be sued, without being authorized by their husbands, or in case of their refusal by the court. Therefore it is not sufficient for those who have a cause of

action against a married woman, to assign her, without assigning her husband also.

A wife is deemed to be sufficiently authorized when her husband is a party with her in the cause; and in this respect judicial acts are different from those which are extra-judicial; for the contract of a married woman is not valid from the mere circumstance of her husband being a party with her to the contract; it is requisite that he should authorize her in express terms.

The rule that a married woman cannot sue, or be sued, without being authorized, is subject to some exceptions. Our *Custom of Orleans*, art. 200, permits her to proceed without her husband on account of affronts (*injures*) which she alleges to have been committed against her, and to defend herself against actions for affronts which she is alleged to have committed.

[31] It remains to observe, with respect to all persons who are incapable of being parties to a suit, that this incapacity does not prevent an accusation being maintained against them, when they have committed any crime, and they may defend themselves against such accusation.

[32] From the principle that a judgment could only be valid when given between persons capable of being parties to a suit, it was deduced as a consequence in the *Roman law*, that a judgment against a party, who at the time of giving it was dead, was null; for a person who had no longer any existence could not have any capacity. Upon this principle *Paulus* said, *Eum, qui in rebus humanis non fuit sententia data tempore, inefficaciter condemnatum videri. L. 1. ff. quæ sunt. sine App.*

In *France*, when the death of either of the parties has not taken place until the cause was ready for judgment, that is when all the procedures are complete, and the cause has been fully heard, the death of either party does not prevent the judge from giving a valid decision. This is the disposition of the first article of *tit. 26*, of the ordonnance of 1667, which has thus disregarded the subtlety of law, in order to avoid the superfluous delays and expence that would arise from a renewal of the proceeding.

When a party dies in the course of the proceeding, and the procureur notifies his death to the procureur of the other party, which is called an *exoine de mort*, the other party cannot take any further proceedings, and no judgment can be given until the cause has been resumed by the heirs, or other successors of the deceased; or after assigning him to resume it, a judgment has been given that it shall be taken as resumed; and all proceedings between the notification of the death and the resumption of the case, and the judgments

ments upon them are absolutely void, *d. tit. art. 1 & 2.* Until the death is signified, the procedure of the other party, and the judgments thereon, are valid. *Art. 3.*

[33] A judgment is also null when a party has sued or defended, on behalf of another, without being entitled to do so.

For instance, in our province of *Orleans*, where a woman under the rank of nobility, who marries a second time, loses the tutelage of her children, and does not carry it to her second husband, if such a husband, under a mistake, of which I have known some instances, makes a demand on behalf of the children, in the quality of their step-father, the judgment upon this demand will be null for want of quality.

For the same reason, if a husband, who may institute and defend actions respecting the moveable property of his wife alone, and without her concurrence, supposing by mistake that it is the same thing with respect to her landed estates, institutes or defends any actions relative to these without his wife, in the quality of her husband, the judgment will be void. For the same reason, if a tutor, after his authority is determined, continues to proceed on behalf of the persons who were under his charge, this procedure and the judgment thereon will be nullities.

But if, by the account which he has rendered, he has charged himself with what was owing from the debtors of the minor, he may proceed in his own name against the debtors, as having a cession of their debts.

[34] When I have given any one a special procuration to institute a demand for me, the demand ought to be made in my name; if it were made in the name of the person having the procuration, the procedure would be void; hence the maxim that no persons in *France* can sue by procuration but the king.

§ III. *Of Judgments which are null in respect of the Judges giving them, or on account of the Non-Observance of the requisite Formalities.*

[35] A judgment may be null in respect of the judge, by whom it is given, when he was without character, as if he had not been received into his office, if he was under an interdiction, if he was incompetent.

Observe, that the nullity arising from these defects does not operate *pleno jure*, but must be taken advantage of by appeal to a superior court.

[36] The non-observance of some formalities may also render the judgment void, of which several examples may be adduced.

[The illustration in the text will not admit of an intelligible translation; the effect of it may be stated, by the case of signing judgment by default, without any appearance being entered by or for the defendant.]

These nullities do not operate *pleno jure*, but must be taken advantage of by way of opposition or appeal, or when the judgment is in the last resort by *civile requête*.

A R T I C L E III.

What is the Authority of Res judicata?

[37] The authority of *res judicata* induces a presumption that every thing contained in the judgment is true, and this presumption being *juris et de jure*, excludes every proof to the contrary; *res judicata pro veritate accipitur. L. 207. ff. de R. I.*

For instance, the party who is condemned to pay any thing is presumed really to owe it; the party in whose favour the judgment is given, may consequently, after signifying it, compel the other to pay the money, by the seizure and sale of his effects, and no proof can be received from him, in contradiction of the debt.

Vice versâ, when the judgment has dismissed the demand, there arises so strong a presumption, that the things demanded are not due, that the demand can never afterwards be renewed, the judgment produces an exception, called *exceptio rei judicatae*, which precludes the demand from being renewed.

[38] As the authority of *res judicata*, excludes all proof in contradiction of what has been adjudged; the party against whom the judgment has passed, is not allowed to offer evidence that the judge has fallen into any error of calculation; *res judicata, si sub pretextu computationis inflaurentur, nullus erit litium finis. L. 2. Cod. de Re Judicat.*

Nevertheless, if the error appears on the face of the judgment itself, it may be rectified; as if the judgment were to state; "We declare *James* to be indebted to *Peter* in 50*l.* for hay, and in 25*l.* for straw; which sums, amounting together to 100*l.*, we condemn him

him to pay," this error appearing on the face of the judgment will correct itself, and *Peter* can only demand 75*l.* and not 100*l.* *L. 1. § 1. ff. Qua sunt sine Apell. (a)*

The authority of *res judicata*, so completely excludes all proof to the contrary, that the party against whom the judgment has been given, cannot impeach it even by decisive writings, which have been since discovered. "*Sub specie novorum instrumentorum postea repertorum, res judicatas restaurari exemplo grave est. L. 4. Cod. de Re Judicat.*"

This principle, that a judgment cannot be rescinded on account of writings being afterwards discovered, was, in the *Roman* law, subject to an exception, in cases where the judge, on account of the doubtful nature of the cause, had administered the suppletory oath to the party in whose favour he decided; in this case the losing party might be relieved against the judgment upon the ground of decisive writings afterwards discovered. *L. 31. ff. de Jurej. (b)*

This exception ought not to be allowed in the law of *France*, for as the ordonnance of 1667, T. 35. Art. 34, only allows the party against whom an *arrêt*, or judgment in the last resort has been given, the benefit of a *civile requête*, upon the subsequent discovery of such writings, where it appears that they have been kept back by the opposite party; it follows, that it cannot be admitted in any other case.

A R T I C L E IV.

With regard to what Things the Authority of Res judicata takes effect.

[40] The authority of *res judicata* only takes effect with regard to the object of the judgment.

(a) Si calculi error in sententia esse dicatur, appellare necesse non est; veluti si judex ita pronuntiaverit: "Cum constet, Titium Seio ex illa specie quinquaginta, item ex illa specie viginti quinque debere: idcirco Lucium Titium Seio centum condemno," nam quoniam error computationis est, nec appellare necesse est, et citra provocationem corrigitur. Sed et si hujus questionis judex sententiam confirmaverit, si quidem ideo, quod quinquaginta et viginti quinque fieri centum putaverit; adhuc idem error computationis est, nec appellare necesse est; si vero ideo, quoniam et alias species viginti quinque fuisse dixerit, appellationi locus est.

(b) Admonendi sumus, interdum etiam post jusjurandum exactum, permitti constitutionibus Principum, ex integro causam agere, si quis nova instrumenta se invenisse dicat, quibus nunc solis usus sit. Sed hæc constitutiones tunc videntur locum habere, cum a judice aliquis absolutus fuerit; solent enim sæpe judices, in dubiis causis, exacto jurejurando, secundum eum judicare, qui juraverit. Quod si alias inter ipsos jurejurando transactum sit negotium, non conceditur eandem causam retractare.

Therefore a party whose demand has been dismissed, can only be excluded by the exception *rei judicatæ* from making a new demand, if the object of the demand is the same.

For this purpose three things must concur; 1st, The demand must be of the same thing; 2d, It must be for the same cause; 3d, It must be made in the same quality.

Quum queritur hæc exceptio (rei judicatæ) noceat necne; inspiciendum est an idem corpus sit, quantitas eadem, idem jus; et an eadem causa petendi, et eadem conditio personarum; quæ nisi omnia concurrant, alia res est. L. 12. L. 13. L. 14. ff. de Excep. Rei Judicat.

But if there is this concurrence, it is immaterial whether the demand be made *eodem an diverso genere judicii*.

§ I. Of the first Requisite ut sit eadem res.

[41] This principle, that the *exceptio rei judicatæ* can only avail in case the second demand is for the same thing as the first, must not be understood too literally. "*Idem corpus in hac exceptione non utique omni pristina quantitate vel servatâ, nulla adjunctione diminutioneque factâ; sed pinguius pro communi utilitate accipitur.*" L. 14. ff. de Excep. Rei Judicat.

For instance, although the flock which I demand now, does not consist of the same sheep which it did at the time of the former demand; the demand is for the same thing, and therefore is not receivable. "*Si petiero gregem (et victus fuero), et vel aucto vel minuto numero gregis, iterum eundem gregem petere obstabit mihi exceptio.*" L. 21. § 1. ff. de Tit.

[42] I am likewise held to demand the same thing, when I demand any thing which forms a part of it. "*Sed et si speciale corpus ex grege petam, puto obstaturam exceptionem.*" d. L. 21. § 1.

This is laid down by Ulpian, "*Si quis, quum totum petisset, partem petat, exceptio rei judicatæ nocet, nam pars in toto est; eadem enim res accipitur, et si pars petatur ejus quod totum petatum est, nec interest utrum in corpore hoc queratur, an in quantitate, vel in jure.*" L. 7. ff. de Excep. Rei Judicat.

[43] I am also held to demand the same thing, which was before in judgment, when I demand any thing issuing from it, and which could only belong to me, so far as the thing from which it issued would have done so.

For instance, if I have demanded from you in the courts of one of our Colonies a female negro, alleging that I had bought her from

from you, and paid for her, and my demand has been dismissed by a judgment in the last resort, I cannot afterwards, upon the same grounds, demand a child, of which she has been delivered, for as I could have no other title to the child, than I had to the mother, that would be renewing the question which had been determined by the former judgment. “*Si ancillam pregnantem petiero (supple et victus fuero), et post litem contestatam conceperit et pepererit, mox partum ejus petam, utrum idem petire videor, an aliud, magnæ questionis est, et quidem ita definiri potest, toties eandem rem agi, quoties apud Judicem posteriorem id quaeritur, quod apud priorem quaesitum est: in his igitur fere omnibus exceptio (rei judicatæ) nocet.*” d. L. 7. § 1.

[44] For the same reason, if I fail in my demand for a principal sum, I cannot afterwards demand the interest which would only be due as arising from the principal. The converse of this does not hold good, for though I have failed in my demand of the interest, I may still demand the principal, for the principal may be due in cases when the interest is not. “*Si in judicio actum sit, usuraque sola petita sint, non est verendum ne noceat exceptio rei judicatæ.*” L. 3. ff. d. t.

[45] If I have failed in a demand against you for a foot-way over your estate, and afterwards demand a right of way for beasts of burthen, shall I be held to demand the same thing, and will you consequently be entitled to oppose the exception *rei judicatæ*? The reason of doubting in favour of the affirmative is, that the present right seems to include the former, since whoever has a right of passage for beasts of burthen, has also a right to a foot-way; and as it has been decided that I have no right to a foot-way, it follows *a fortiori*, that I have not the other; the reason for deciding the contrary is, that as these rights of servitude are entirely distinct, the demand of one of them has a different object from the demand of the other, and therefore it cannot be said that I am demanding the same thing which I did before, and consequently my demand cannot be barred by the exception *rei judicatæ*. To the argument adduced on the other side, I answer, that it has only been decided that I had not any foot-way, nor consequently *a fortiori*, any cattle road by virtue of such foot-way; it does not follow, that I may not have another kind of servitude for a cattle way, respecting which there was not any question in the former judgment. This is decided by *Ulpian*. *Si quis iter petierit, deinde actum petat; puto fortius defendendum aliud videri tunc petitum aliud nunc et ideo exceptionem rei judicatæ cessare.* L. 11. § 6. ff. d. Tit.

The contrary must be decided, when the demand, although more extensive, is for the same kind of servitude. Of which *Africanus* gives the following

following example : “ *Egi tecum jus mihi esse ades meas usque ad decem pedes altius tollere, post ago jus mihi esse usque ad viginti pedes altius tollere : exceptio rei judicata procul dubio obstabit, sed et si rursus ita agam jus mihi esse ad alios decem pedes tollere, obstabit exceptio, cum aliter superior pars jure haberi non possit, quam si inferior quoque jure habeatur. L. 26. ff. dict. Tit.*

§ II. Of the second Requisite that the Demand be founded on the same Cause (*ut sit eadem causa petendi.*)

[46] It is not a sufficient ground for the exception *rei judicata*, that the present demand is for the same thing, unless it is also for the same cause, *oportet ut sit eadem causa petendi.*

There is in this respect a difference between personal actions and real.

Although I have failed in a personal action, by which I demanded any thing as due from you, by virtue of a certain cause of obligation ; this does not preclude me from demanding the same thing, as due for a different cause.

Suppose for instance, it has been agreed between you and me, that for a piece of work which I was to do for you, and have actually done, you should give me 10*l.* or your horse, at my election ; afterwards you sell me the horse for a certain price, and I institute the action *ex empto* against you to deliver it, and not being able to prove the sale, the demand is dismissed, this does not preclude me from demanding the same horse, by the *actio ex prescriptis verbis*, by virtue of the agreement.

On the contrary, in *real* actions ; if I claim any thing which you possess, and which I pretend belongs to me, a judgment in your favour would preclude me, from making any new demand against you for the same thing, even if I should offer to shew that it belonged to me, on a different account from that on which I had claimed it before.

The reason of the difference is, that the same thing may be due to me by virtue of different obligations, and I have as many different claims, and as many actions against my debtor, as there are different causes of obligation, which actions involve as many different questions, and a judgment dismissing one of them, decides nothing with regard to the others, and consequently cannot preclude me from pursuing them ; the judgment in the action *ex empto*, which decides that you do not owe me the horse by virtue of the sale, does not establish that you do not owe it to me by virtue of a dif-

a different contract, nor consequently preclude me from demanding it, by an action founded upon such contract.

It is otherwise with respect to the right of property; although there may be several different claims for the same thing, there can be only one right of property in it; therefore, when my demand against you, claiming the property of a certain thing has been dismissed, and it has been decided that the thing does not belong to me, I can have no other action against you founded upon a claim of the same property, for that would be to renew the question already decided, for the single question was whether the thing belonged to me or not; and it is of no signification that I omitted to propose any claim, upon which the demand could have been established; it is sufficient that it might have been proposed.

This is laid down by *Paulus*. *Actiones in personam ab actionibus in rem in hoc differunt, quod cum eadem res ab eodem mihi debeat, singulas obligationes singulae causae sequuntur, nec ulla earum alterius petitione vitatur; at quum in rem ago, non expressam causam, ex qua rem meam esse dico omnes causae una petitione apprehenduntur: neque enim amplius quam semel res mea esse potest, saepius autem deberi potest. L. 14. § 2. ff. de Except. Rei Jud.*

Hence the rule, *non ut ex pluribus causis deberi nobis idem potest, ita pluribus causis idem possit nostrum esse.*

[47] What has been said respecting a real action, only holds good when the demand has been made in a general manner, and without restriction, for if it was restrained to a certain ground, upon which I claimed to be the proprietor of the thing in question, a judgment that I was not entitled upon that ground, would not exclude me from demanding it upon any other.

For instance, if I claimed an estate as heir at law of a relation, and disputed his will on the ground of its being forged, or invalid, although I failed in my demand, I should not be precluded from demanding the same estate upon any other ground. *Et si questurus titulus prior inofficiosi testamenti causam habuisset, judicata rei prescriptio non-obstaret eandem hereditatem aliam causam vindicanti. L. 3. Cod. de Pet. Hered. adde. L. 47. ff. de Pet. Hered. (a)*

[48] However general the first demand may have been, the judgment does not preclude me from making a new claim, by virtue of a title which has since accrued, for the decision that I was not the proprietor at that time, does not prevent my

(a) *Lucius Titius, cum in falsi testamenti propinqui accusatione non obtinuerit, quæro an de non jure facto, nec signato testamento querela illi competere possit? Respondit, non ideo repelli ab intentione non jure facti testamenti, quod in falsi accusatione non obtinuerit.*

afterwards becoming such. The question whether I have acquired the property, by a title which has accrued since the judgment, is entirely different from that before decided; for it is a settled principle that the *exceptio rei judicatae*, only applies when the same question is renewed, which has already been decided.

§ III. *Of the third Requisite, that the Condition of the Persons should be the same.*

[49] The third requisite to the exception *rei judicatae*, is that the person who demands the same thing as before, should demand it in the same quality, and that the demand should also be made from the defendant, in the same quality as before. For instance, if I demand any thing from you merely in the quality of tutor of a minor, a failure in that demand does not prevent my making another in my own right, and *vice versâ*, for in the first case, I was not, properly speaking, a party; the real party was the minor, by my ministry; the new demand in my own name is not then between the same parties, and cannot be precluded by the decision of the first; the authority of which only prevails between the same parties, as we have already seen.

§ IV. *That it is immaterial whether the Demand be made in the same or a different Form of Proceeding (eodem an diverso genere Judici.)*

[50] Provided the three things, which are mentioned in the preceding paragraphs concur, the authority of *res judicata* equally attaches, whether the demand is made in the same form of action or another. *Eodem an diverso genere judicii generaliter, ut Julianus definit, exceptio rei judicatae obstat, quoties inter easdem personas eadem questio revocatur, vel alio genere judicii. L. 7. § 4. ff. de Ex. Rei Jud.*

Several instances may be stated of this principle: suppose, for example, you proceed against me by the action *quanto minoris*, to obtain an abatement in the price of a horse, which you allege to have a certain fault against which I have warranted him, it is decided that the horse has not that fault, or that the warranty did not extend to it, and the demand is dismissed; if you afterwards institute another action against me to rescind the sale, on account of the same fault, I may oppose the exception *rei judicatae*, although the new demand is made in a different form, and aims at a different

ferent conclusion, the three requisites already mentioned concur, it is the same horse, *eadem res*, there is also *eadem causa petendi*, for the question in both cases is, whether I have warranted against the fault which you complain of, and the question is between the same parties, the difference of the actions, and of the conditions, does not prevent their having the same object and being *eadem res*, *cum quis actionem mutat, et experitur, dummodo de eadem re experiat, etsi diverso genere actionis quam instituat videtur de eadem re agere.* (a)

ARTICLE V.

Between what Persons the Authority of Res judicata takes place.

[51] The authority of *res judicata* only takes place between the parties to the judgment, it gives no right to or against third persons, *res inter alios judicatae, neque emolumentum offerre his qui judicio non interfuerunt, neque prejudicium solent irrogare.* L. 2. Cod. Quib. res jud. non nocet.

Sape constitutum est res inter alios judicatas aliis non prejudicare. L. 6. 3. de Re jud.

In order to apply this principle, we must inquire what persons are to be considered as the same parties, so that the judgment is to be held conclusive between them, and between what persons on the other hand the judgment is to be regarded as *res inter alios judicata*, from which no right can ensue for or against them.

[52] A case is held to be decided between the same parties, not only when the same persons have appeared as parties themselves, but also when they have appeared by their tutors, curators, or other legitimate administrators.

(a) This doctrine is clearly illustrated by the case of *Kitchen or Hitcher v. Campbell*, 3 Wils. 304. 2 Bl. 827, where the plaintiffs having failed in an action of trover, were not allowed to recover in assumpsit for money had and received, it appearing to the court that the cause of action was such, that trover might have been maintained; and that a party shall not bring the same cause of action twice to a final determination; and what is meant by the same cause of action, is where the same evidence will support both the actions, although the actions may happen to be grounded upon different writs, and this is the test to know whether a final determination in a former action is a bar or not to a subsequent action.

In the instance cited in the text, the *English* and the *Roman* law would I conceive certainly coincide, for I apprehend there is no case in which the purchaser of a horse having a right on account of a false warranty to return him, and rescind the sale, may not bring an action on the case upon the warranty, but in the converse case, to support an action founded on the rescission of the sale, there must be a return within a reasonable time, which is not necessary in an action on the warranty; therefore a failure in the first, is not necessarily a bar to the other.

For

For instance, if the tutor of a minor makes a demand upon me in that quality, which is dismissed, and the minor, after he comes of age, prefers the same demand, he may be repelled by the *exceptio rei judicate*, for he is considered as the real party in the former cause.

For the same reasons, if the officers of a parish institute a demand against me, in that character which has been dismissed, and their successors make the same demand, I may oppose the exception *rei judicate*; for the parish was party to the first demand, and cannot, by the ministry of its new officers, repeat a demand which was decided against it, in the persons of their predecessors.

[53] The successors of the parties, are considered as the parties themselves, and therefore a judgment has the same authority for or against them, as it had with respect to those whom they have succeeded.

For instance, a judgment of dismissal against you, gives me the same exception against your heirs, as against yourself.

[54] This is quite indubitable with respect to heirs and other universal successors, who are *in loco heredum*. In real actions, the person who succeeds another in the subject of the suit, even by a particular title, is regarded as the same party.

For instance, if you claim a certain estate from *Peter*, the judgment which discharges him from your demand, will give the *exceptio rei judicate*, to any person afterwards purchasing from him, for the purchaser is considered as the same party. *L. 11. § 3. ff. de Exi. Judicat. (a)*

For the same reason, if I have a dispute with the owner of an adjoining estate, for the purpose of compelling him to remove a work which as I allege throws the water from his estate upon mine, and after judgment either of us sells our estate, the *exceptio rei judicate* will be allowed for or against the purchaser. *de L. § 9. (b)*

The laws cited relate to a purchaser, and there is no question but that he has the same exceptions as the seller, who would be bound to defend any action against him, and to save him harmless from the consequences of it.

(a) Julianus scribit : Cum ego et tu heredes Titio extitissimus ; si tu partem fundi, quem totum hereditarium dicebas, a Sempronio petieris, et victus fueris ; mox eandem partem a Sempronio emero ; agenti mecum familie eriscundæ, exceptio obstabit ; quia res judicata sit inter te et venditorem meum : nam etsi ante eandem rem petissem, et agerem familie eriscundæ ; obstaret exceptio, *Quod res judicata sit inter me et te.*

(b) Si egero cum vicino aquæ pluvie arcendæ, deinde alteruter nostrum prædium vendiderit, et emptor agat, vel cum eo agatur, hæc exceptio nocet ; sed de eo opere, quod jam erat factum, cum judicium acciperetur.

Although this reason does not extend to successors by a lucrative title, to which no warranty is attached, they are nevertheless to be considered as the same parties, with the persons whom they have succeeded in the property in question, and have the same benefit of the judgment.

For instance, if I have obtained a decision against you, that my estate did not belong to you, or that it was not subject to a servitude claimed by you, and you afterwards institute a similar claim against the person to whom I have given the estate, he may oppose the exception *rei judicatæ*, against you, as having succeeded to my rights.

The reason is, that as we are deemed in agreements respecting any thing which belongs to us, to stipulate for our successors, and the right arising from the agreement passes to them, as we have seen, *supra*, n. 67. 78. So when we engage in a litigation, respecting any thing which may belong to us, we are deemed to contend as well for ourselves, as for all who may succeed us; and the right arising from the judgment, ought to pass to all our successors, *eadem enim debet esse ratio judiciorum in quibus videmur quasi contrahere conventionem.*

[56] And as a successor is intitled to the benefit of a judgment in favour of the person under whom he claims, a judgment against the latter may, *vice versâ*, be opposed to the former, provided his title has only accrued subsequent to the process upon which the judgment was given. For instance, *Peter* claims an estate from you, and judgment is given against him, he afterwards gives me a special hypothecation upon the estate, whereupon I institute an action against you, you may oppose the exception *rei judicatæ* against me, for it was decided by the judgment against *Peter*, that the estate did not belong to him, and consequently that he could not hypothecate it to me.

It would be otherwise, if the hypothecation had been previous to the process against you; for a judgment, that *Peter* was not at that time the proprietor of the estate, does not decide that he was not such at the time of the hypothecation. And if I shew that he was the proprietor, then it is sufficient, although he might afterwards, and at the time of the process with you, have ceased to be so. *L. 11. § 10. ff. de Ex. Re Jud. (a) L. 3. ff. de Pig. & Hyp. (b)*

Although

(a) Si rem, quam a te petierat Titius pignori Seio dederit, deinde Seius pignoratitia adversus te utatur; distinguendum est quando pignori dedit Titius, et siquidem antequam peteret; non oportet ei nocere exceptionem, nam et ille petere debuit, et ego salvam habere debeo pignoratitiam actionem, sed si postea quam petit, pignori dedit, magis est, ut noceat exceptio rei judicatæ.

(b) Si superius sit debitor, qui rem suam vindicabat, quod suam non prelat; æque

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[57] Although a successor is considered as a party to a judgment, for or against the person under whom he claims, the latter is not *e converso* a party to a judgment, for or against the former, and therefore such a judgment cannot be taken advantage of by or against him. *Julianus scribit ; exceptionem rei judicate a persona auctoris ad emptorem transire solere ; retro autem ab emptore ad autorem reverti non debere. L. 9. § 2. ff. de Ex. Rei Jud.*

He gives the following example : *Si hereditariam rem vendideris, ego eandem ab emptore petiero et vicero ; petenti tibi non opponam exceptionem, at si ea res judicata non sit inter me et eum cui vendidisti. dist. §.*

Item si victus fuero, tu adversus me exceptionem non habebis. L. 10.

[58] We have established that a judgment is considered as having intervened between the same parties, so far as respects either the parties themselves, or those deriving their title under them ; on the other hand, the judgment as to all who were not parties to it, either by themselves, or those under whom they claim, is *res inter alios judicata*, and cannot be opposed, either by or against them ; and this is the case although the question is the same, to be decided upon the same principles, and depending upon the same facts.

This will appear from an instance stated by *Paulus*. I intrust a sum of money with a person who has left several heirs, I demand from one of those heirs the restitution of his share, and the judge, not having paid sufficient attention to my proofs, dismisses the demand ; if I demand from the other heirs the shares for which they are liable, they cannot oppose against me the judgment in favour of their co-heir, because with respect to them it is *res inter alios judicata*, which cannot give them any right, although the question is the same with that already decided against me in favour of the co-heir, and depends on the same facts, that is to say, whether I really intrusted the money to the deceased, or whether he returned it to me, *si cum uno herede depositi actum sit, tamen et cum ceteris heredibus recte agetur, nec exceptio rei judicate ei proderit, nam etsi eadem questio in omnibus judiciis vertitur, tamen personarum*

servanda erit creditori actio Serviana, probanti, res in bonis eo tempore, quo pignus contrahabatur illius fuisse. Sed et si victus debitor vindicans hereditatem, iudex actionis Servianæ, neglecta de hereditate dicta sententia, pignoris causam inspicere debet. § 1. Per injuriam victus apud iudicium, rem quam petierat, postea pignori obligavit ; non plus habere creditor potest, quam habet, qui pignus dedit. Ergo summovebitur rei judicate exceptione ; tamen maxime nullam propriam, qui vicit, actionem exercere possit : non enim quod ille non habuit, sed quid in ea re quæ pignori data est, debitor habuerit considerandum est.

mutatis

mutatio cum quibus singulis suo nomine agitur aliam atque aliam rem facit. L. 22. ff. de Ex. Rei Jud.

This principle, that the authority of *res judicata* only extends to the parties to the cause, and their successors, is connected with another, which we have established in the preceding article, viz. that the authority of *res judicata* only applies to the same thing which was before in judgment.

For instance, in the preceding example, the judgment in favour of one of the heirs does not afford the *exceptio rei judicatae* to the others, not only as being *res inter alios judicata*, but also because the object of the demand is different; for although both the demands are for parts of the same debt, they are not for the same parts. The judgment in favour of the one heir has decided nothing with respect to the parts of the others, and therefore cannot as to them have the authority of *res judicata*. This is what is meant by the jurist in the law already cited, *mutatio personarum cum quibus singulis suo nomine agitur aliam atque aliam rem facit*.

So, when the creditor has left several heirs, a judgment in favour of the debtor, upon the demand of one, cannot be opposed to the others, it being as against them, *res inter alios judicata*, and a different thing; for the parts demanded by the other heirs, although parts of the same demand, are not the same parts, which were before in judgment.

[59] It is otherwise when the thing due to several heirs, or other co-proprietors, is something indivisible, such as a right of servitude; for, as this is not susceptible of parts, each is creditor or co-proprietor of the whole. And therefore the judgment, upon the demand of any one, has the same object as the demand of the others, and is *eadem res*; and it may likewise be said, that it is not *res inter alios judicata*, with respect to the other creditors or proprietors; for, from the indivisibility of their right, they are regarded as the same party, and therefore the authority of the judgment extends to themselves: if it was in favour of their co-proprietor, or joint creditor, they are entitled to the benefit of it; if it was against him, they are bound by it.

Nevertheless, if the judgment was given by collusion, the law allowed the others to renew the question, *si de communi servitute quis bene quidem deberi intendit, sed aliquo modo litem perdidit, culpa sua non est æquum hoc ceteris damno esse, sed si per collusionem cessit litem adversario; ceteris dandam esse actionem de dolo* (that is, as the *Gloss* very well explains it, *replicationem de dolo contra exceptionem rei judicatae*). *L. 19. ff. si Serv. Vind.*

According to our usages, the judgment against one of several creditors, or co-proprietors of an indivisible right, may indeed be opposed to the others; but they are not obliged to allege collusion in order to avoid the effect of it: they may appeal, although the immediate party has acquiesced; and if the judgment is in the last resort, may form an opposition to it.

So, if there be several debtors of an indivisible thing, they are regarded as one party, and consequently a judgment against any of them is deemed to be against all, except that those who were not parties themselves may be relieved by appeal or opposition, as above mentioned.

[61] In consequence of the obligation of the surety being dependant upon that of the principal debtor, the surety is also regarded as the same party with the principal, with respect to whatever is decided for or against him. Therefore, if the demand against the principal has been dismissed, provided it was not upon grounds personal to himself, the surety may, in case he is afterwards proceeded against, oppose the *exceptio rei judicatae* to the creditor. *Si pro servo meo fidejusseris et mecum de peculio actum est (supple et judicatum sit nihil a servo meo deberi), si postea te cum eo nomine agatur excipiendum est de re judicata.* L. 21. § 4. de Ex. Rei Jud.

The creditor cannot in this case reply, that it is *res inter alias judicata*; for, as it is of the essence of the engagement of a surety, that his obligation depends upon that of his principal, that the surety cannot owe more than the principal, and that he may oppose all the exceptions *in rem*, which could be opposed by the principal; it follows, that whatever has been decided in favour of the principal, must be taken to be decided in favour of the surety, who ought in this respect to be considered as the same party.

Vice versa, when the judgment was against the principal, the creditor may oppose it to the surety, and demand that it should be carried into execution against him, but the surety is allowed to appeal against this judgment, or to form an opposition to it if it is in the last resort; *admittuntur ad provocandum fidejussores pro eo pro quo intervenerunt.* L. 5. § 1. ff. de Apell.

[62] According to the *Roman* law, the right of the legatees depended upon that of the instituted heir, and therefore a judgment against the heir, declaring the testament to be null, was not looked upon as *res inter alias judicata*, with respect to the legatees, and might be opposed to them, they being considered,

sidered, on account of the dependency of their right, as in some degree as the same parties ; but they are admitted to appeal from the judgment, *L. 5. § 1 & 2. ff. de Apell. (a)* ; or when the judgment was in the last resort, to form an opposition to it.

It was otherwise with respect to a judgment, which, upon the demand of a legatee, declared the testament to be void, and dismissed the claim ; this with respect to the other legatees was regarded as *res inter alios judicata*, which could not be opposed to them, and from which it was not necessary for them to appeal. *L. 1. ff. de Ex. Rei Jud. (b)* The reason of the difference is, that the right of the legatees did not depend upon that of their co-legatee, against whom the judgment was given, as it did upon that of the instituted heir, *cum ab institutione heredis pendeant omnia que testamento continentur.*

SECTION IV.

Of the Oaths of the Parties.

[817] There are three principal kinds of oaths, which are used in civil suits ; 1st, The oath which one of the parties defers or refers back to the other, for the decision of the cause, and which is therefore called the decisory oath. 2d, The oath to be taken by a party, who is interrogated upon facts and articles. 3d, The oath which the judge, of his own motion, defers to one of the parties, either for the decision of the cause, or in order to fix and determine the quantity of the condemnation, this is called *juramentum judiciale*.

ARTICLE I.

Of the Decisory Oath.

[818] The decisory oath, as we have already said, is that which one of the parties defers or refers back to the other, for the decision of the cause.

(a) Si heres institutus victus fuerit ab eo, qui de inofficioso testamento agebat : legatariis et qui libertatem acceperunt, permittendum est appellare, si querantur per collusionem pronunciatum : sicut Divus Pius rescripsit, § 2. Idem rescripsit, legatarios causam apellationis agere posse.

(b) Cum res inter alios judicatae nullum aliis præjudicium faciant : ex eo testamento ubi libertas data est, vel legato agi potest : licet ruptum vel vitium, aut non iustum dicatur testamentum ; nec si superatus fuerit legatarius, præjudicium libertati fit.

§ I. *With respect to what Things the Decisory Oath may be deferred.*

[819] The decisory oath may be deferred in any kind of civil contest whatever, in questions of possession, or of claim; in personal actions, and in real, *jusjurandum et ad pecunias, et ad omnes res locum habet. L. 34. ff. de Jurej.*

It can, however, only be deferred to a party respecting his own personal acts; a party is not obliged to take it, with respect to the acts of another person, to whom he is heir, or to whose rights he has succeeded; for although I cannot be ignorant of my own act, whereas I am not obliged to know the acts of others, whom I may represent, *heredi ejus cum quo contractum est, jusjurandum deferri non potest, Paulus, 11. 1. 4.*

A person, therefore, who demands from me the price of any thing, which he alleges that he has sold to the deceased, whom I have succeeded as heir, cannot defer to me the oath with respect to the fact of sale: for that is not my act, but the act of the deceased, which I am not obliged to know; but the oath may, according to our usage, be deferred, as to whether I have any personal knowledge of the debt.

§ II. *In what Cases the Decisory Oath may be deferred.*

[820] The plaintiff may defer the oath to the defendant, whenever he conceives that he has not a sufficient proof of the fact, which is the foundation of his claim. And in like manner, the defendant may defer it to the plaintiff, when he has not a sufficient proof of his defence.

This oath may be demanded, either before or after the contestation of the cause, upon an appeal, as well as in the original suit.

It is a controverted question, whether any commencement of proof is necessary, in order to enable the plaintiff to defer the oath. The *Gloss, ad L. 3. Cod. de Reb. Credit. Bartholus Baldus*, and several other writers, cited by *Mascardus de Probat. conclus. 957*, require some commencement of proof. The reasons which they allege for this opinion, are 1st, That it is a general principle of the law, that the defendant ought to be dismissed from a demand, which is not proved against him, without any proof on his part being necessary, *actore non probante, qui convenitur, etsi nihil ipse præslet, obtinebit. L. 4. Cod. de Edendo.* Then, say they,

they, the defendant ought not to be compelled to take any oath, in order to obtain his liberation from the demand against him, since the law says, that he is not bound to any thing, *et si nihil prestat*. 2d, It is also a principle of law, that it is for the plaintiff to furnish the proofs of his demand, and not for the defendant to furnish proofs against himself, *intelligitis quod intentionis vestre proprias adferre debitis probationes, nec adversus se ab adversariis adduci. L. 7. Cod. de Test.* Then the plaintiff, who has not adduced any proof of his demand, should not be allowed to procure one by the oath of the defendant. 3d, It is said, that a person ought not, without any ground, to involve another in a law suit, and put him to the inconvenience of making an affirmation, which timid persons are often afraid to do, even as to matters of which they have the greatest certainty. It is also attempted to derive some arguments from the *L. 31. ff. de Jurej.* and the laws, 11 & 12. *Cod. de Reb. Cred.* The contrary opinion, that the plaintiff may defer the oath without any commencement of proof, to entitle him to demand the oath, is more correct, is and embraced by *Cujas, Obs. XXII. 28. Duaren, Doneau, Fachinée* and several others; it is also that of *Vinnius*, who has very perfectly examined the question, *Sel. Quest. 142*, and whose observations we at present merely copy: the reasons upon which it is established, are, 1st, That nothing more ought to be required from a plaintiff than is required by the law which establishes the use of the decisory oath; now the edict of the prætor which establishes this right, does not require any commencement of proof; it says generally, *eum a quo jusjurandum petitur, jurare aut solvere cogam. L. 34. § 6. ff. de Jurej.* 2d, It may frequently happen, that a demand, of which there is not any commencement of proof, may still be very just. For instance, I have lent an acquaintance a sum of money, without taking any acknowledgment; my demand for the repayment of this money is not the less just, from my not having any commencement of proof of the loan of it; the judge ought not then to neglect any of the means which he has for the discovery of the truth; I present such means by deferring the oath; if the defendant refuses to swear, either that the money was never lent, or that it was returned, his refusal will be a tacit acknowledgment of the debt; the judge ought then to avail himself of this mode of discovering the truth, and allow me to defer the oath; although I have not any commencement of proof of my demand, the defendant's refusal to swear will be a complete proof of the debt, and of his wrongfully refusing the payment of it, *manifesta turpitudinis et confessionis est nolle jurare. L. 38. ff. de Jurej.* 3d, This opinion is also established by formal texts of the law It is said

in law 12. *Cod. de Reb. Cred.* that the oath may be deferred, even at the commencement of the cause, *in principio litis*, and consequently before the plaintiff has given any proof. The law 35. *ff. de Jurej.* is expressed in terms still more formal; it says, that the oath may be deferred, *omnibus aliis probationibus deficientibus*.

The reasons above stated, in support of the first opinion, are frivolous, and may easily be answered; when it is said, that the defendant is intitled to his discharge, from a demand against him, without being bound to do any thing on his own part, *etiamsi nihil ipse præstet*; it is only meant that he is not under the necessity of producing any witness, or voucher, not that he is not compellable to take the oath, if it is deferred to him. As to what is said in law 7. *Cod. de Test.* that a defendant is not obliged to furnish proofs against himself, this is only referable to the position in the preceeding parol of the law, that the defendant is not obliged to produce any witnesses or letters against himself, *nimis grave est quod petitis, urgere partem diversam ad exhibitionem eorum per quos sibi negotium fiat*, but has no application to the decisory oath; a party cannot complain that he is hardly dealt with, when he is made the judge in his own cause. With respect to what is said, of the inconvenience of putting a person without any reason, to the trouble of an affirmation; I answer, that it is impossible to avoid every kind of inconvenience. To support a law-suit, is a much greater inconvenience than to make an affirmation, which may put an end to the suit at once; yet a person, by instituting a demand against me, without any proof, may put me to a great deal of trouble and inconvenience; and why should he not be equally allowed to do so, by deferring to me the oath? The *Romans* established a kind of remedy for these inconveniences, by obliging the parties, who instituted or contested a demand, to swear that they did so *bonâ fide*, and the party who deferred the oath, was in like manner obliged to swear, that he did so wholly with a view to establish the truth, and without any intention of harassing the opposite party; this was called, *juramentum de calumnia*; these oaths are not in use with us. With respect to the laws referred to, in support of the first opinion, they prove nothing upon the subject. The law 31, relates only to the suppletory oath required by the judge, and not to the decisory oath. In the law 12, the question is indeed, whether the oath was properly or improperly deferred; but this respects either the nature of the fact, or the quality of the respective parties, and has no relation to requiring a commencement of proof.

§ III. *Of the Persons, by and to whom the Decisory Oath may be deferred.*

[821] As the decision of the contest, and the right of the parties, is made to depend upon this oath, it follows, that it can only be deferred, by or to those who have the disposition of their rights.

Therefore it cannot be deferred by a minor, without the authority of his tutor, *L. 17. § 1. ff. de Jurej. (a)*, neither can it be deferred to him. *L. 34. § 2. (b) ff. dic Tit.*

According to this principle, an insolvent person cannot, in fraud of his creditors, defer this oath to his debtor, for he cannot dispose of his rights in fraud of his creditors. Therefore, the creditors, without paying any regard to the oath made by the debtor of their debtor, may proceed against him for the recovery of the debt. *L. 9. § 5. ff. dic Tit. (c)*.

Some doctors have maintained, that a person to whom the oath cannot be referred back, on account of the fact not being within his own knowledge, cannot defer it to the opposite party, whose own act is the subject of it. This is the opinion of *Nutta, Conf. 35*, which is founded upon the *L. 35. ff. de Jurej.* where it is said, that the person to whom the oath is deferred, cannot complain of any injury as he may refer it back, *de injuria queri non potest, cum possit jusjurandum referre*. Then says he, by argument, *e contrario*, the person to whom the oath is deferred, is not obliged to accept the condition, in case he cannot refer it back. This consequence is of no importance; what is stated is only an additional reason for the person to whom the oath is deferred, not having any reason to complain; the principal reason, which is stated elsewhere, and which is alone sufficient, is, that no man can complain of being made the judge of his own cause. The opposite sentiment, which is that of *Fachinée*, of *Cravetta*, and of other doctors cited by him, is founded upon more solid reasons. We

(a) Pupillus tutore auctore jusjurandum deferre debet, quod si sine tutore auctore detulerit, exceptio quidem obstat: sed replicabitur quia rerum administrandarum jus ei non competit.

(b) Pupillo non defertur jusjurandum.

(c) Sed et si quis in fraudem creditorum jusjurandum detulerit debitori, adversus exceptionem jurisjurandi, replicatio fraudis creditoribus debet dari. Præterea si fraudator detulerit jusjurandum creditori, ut juret sibi decem dari oportere, mox bonis ejus venditis, experiri volet; aut denegari debet actio, aut exceptio opponitur fraudatorum creditorum.

ought not to require from the person who defers the oath more than is required of him by the law; now there is no law which requires that the person to whom the oath is deferred, should be one who is able to refer it back; on the contrary, the *L. 17. (a) § 2.* expressly permits a tutor and curator to defer the oath, in respect to causes in which they are engaged in those qualities, although it cannot be referred back, since the cause of the pupil, or interdict, does not relate to the personal act of the tutor, or curator.

A procureur cannot defer the oath, unless he has, either a special power for the purpose, or else is a procurator *omnium bonorum*, which is a general power of conducting the affairs of his principal. *L. 17. (b) § 3.*

§ IV. *Of the Effect of the Oath being deferred, referred, taken, or refused.*

[822] The person to whom the oath is deferred, ought either to take it or refer it back; and if he will not do either, the cause should be decided against him, *manifesta turpitudinis et confessionis est nolle jurare nec jusjurandum referre. L. 38. ff. d. Tit.*

If the fact in question is not the act of both parties, but only of him to whom the oath is deferred, he will not have the option of referring it back, but is under an absolute obligation to take the oath upon pain of losing the cause.

If the party makes the oath required of him, it will form a presumption *juris et de jure* of the truth of what he has affirmed; and as we have already observed in the second division of this section, no proof can ever be received to the contrary.

If he refers the oath back, the party to whom it is referred will be absolutely bound to take it, or the cause will be decided against him; if he does take it, whatever he affirms will in like manner be deemed to be conclusively proved; and no evidence can be admitted to the contrary.

All these rules are comprized in the *L. 34. § Fin. ff. de Jurej. (c)*

When

(a) *Si tutor qui tutelam gerit, aut curator furiosi prodigive, jusjurandum detulerit: ratum id habere debet, nam et alienare res et solvi eis potest: et agendo rem in judicium ducunt.

(b) Procurator quoque quod detulit, ratum habendum est: scilicet si aut universorum bonorum administrationem sustinet, aut si id ipsum nominatum mandatum sit, aut si is rem suam procurator sit.

(c) Cum res in jusjurandum demissa sit, judex jurantem absolvit, referentem audiet, et si actor

When the defendant is the party to whom the oath is deferred, or referred back, his oath that he does not owe what is demanded gives him an exception, called *exceptio jurisjurandi*, which entitles him to have the demand dismissed with costs (*en faire donner congé avec depens.*)

This exception being founded upon a presumption *juris et de jure*, excludes the plaintiff from giving any evidence, that the defendant was perjured; as is shewn by *Julianus, adversus exceptionem jurisjurandi, replicatio doli mali non debet dari, cum prator id agere debet ne de jurejurando queratur. L. 15. ff. de Excep.*

He would not even be admitted to make such proof by writings newly discovered, in which respect a decisory oath has more effect than the suppletory oath, which we shall speak of *infra*, Art. III. *Gaius* takes notice of this difference in *L. 31. de Jurej. (a)*

When it was the plaintiff to whom the oath was deferred or referred back, his oath that what he demanded was due, gave him, by the Roman law, an action in *factum*, similar to the *actio judicati. L. 8. Cod. de Reb. Cred. (b)* Upon which action the only question was, whether the oath had been regularly taken, without admitting any defence in respect of the original cause of action. *In qua (actione) hoc solum queritur, an juraverit dari se oportere. L. 9. § 1. de Jurej. Dato jurejurando, non aliud queritur quam an juratum sit; remissa questione, an debeatur. L. 5. § 2. ff. dict. Tit.*

With us the plaintiff may at once obtain judgment for payment of his demand with costs, and no defence can be received in opposition to it.

This effect results from of the principle of natural law, *quid tam congruum fidei humane, quam ea quæ inter eos placuerunt, servari. L. 1. ff. de Pact.* In fact, when one of the parties defers the oath, for the purpose of determining the matter in dispute, and the other accepts the condition, and takes the oath, or declares him-

si actor juret, condemnet reum; si solvat, absolvit, non solventem condemnat ex relatione, non jurante actore, absolvit reum.

(a) Admonendi sumus, interdum etiam post jusjurandum exactum, permitti constitutionibus principum, ex integro causam agere, si quis nova instrumenta se invenisse dicat, quibus nunc solis usus sit. Sed hæc constitutiones tunc videntur locum habere, cum judice aliquis absolutus fuerit: solent enim sæpe judices in dubiis causis, exacto jurejurando, secundum eum judicare qui juraverit. Quod si alias inter ipsos jurejurando transactum sit negotium, non conceditur eandem causam retractare.

(b) Actori delato, vel relato jurejurando, si juraverit, vel ei remissum sit sacramentum, ad similitudinem judicati in factum actio competit.

self

self ready to take it, there is a mutual agreement to abide by what shall be affirmed ; which agreement is obligatory upon the party deferring the oath, and excludes him from offering any proof in contradiction of what is sworn.

As an agreement only produces an obligation, in consequence of the mutual consent of the parties, it follows, that a person who has deferred the oath, may retract the proposal at any time before the opposite party has accepted the condition, by swearing, or at least declaring his readiness to swear, what is required. *L. 11. Cod. de R.} C. et Jurej.* (a) Observe, that a party who has revoked his demand of the oath, cannot defer it a second time. *D. L. 11.*

When the party to whom I have deferred the oath has accepted the condition, and declared himself ready to take it, I cannot revoke the offer, but I may discharge him from taking the oath, and in that case what he offers to swear will be taken as proved, in the same manner as if he had actually sworn it. *L. 6. (b) L. 9. § 1. (c) ff. de Jurej.*

[823] From the principle which we have established, that the decisory oath derives all its effects from the agreement of the parties, it follows, that as an agreement has no effect except with regard to the object of it, and that only between the contracting parties and their heirs, “ *animadvertendum est ne conventio in aliâ re factâ aut cum aliâ personâ, in alia re, aliave personâ noceat.* *L. 27. § 4. ff. de Pact.* so the effect of a decisory oath is confined to the particular object of it.

The question whether a demand is the same, may be decided by the application of the several rules, which were esta-

(a) Si quis iurjurandum intulerit, et, necdum eo præstito, postea (utpote sibi allegationibus abundantiis) hoc revocaverit : sancimus nemini licere penitus iterum ad sacramentum recurrere, (satis enim absurdum est redire ad hoc, cui renunciandum putavit, et cum desperavit aliam probationem, tunc denuo ad religi. nem convolare) et iudices nullo modo [eos] audire ad tales iniquitates venientes. Si quis autem sacramentum intulerit, et [hoc] revocare maluit, licere quidem [ei] hoc facere, et alias probationes, si voluerit, præstare : Ita tamen ut huiusmodi licentia usque ad litis tantummodo terminum ei præstetur. Post definitivam autem sententiam, quæ provocatione suspensa non sit, vel quæ, postquam fuit appellatum, corroborata fuerit : nullo modo revocare juramentum, et iterum ad probationem venire cuquam concedimus : ne repetita lite, finis negotii alterius causæ fiat exordium.

(b) Remittit iurjurandum, qui deferente se, cum paratus esset adversarius jurare, gratiam ei fecit, contentus voluntate suscepti iurjurandi. Quod si non suscepit iurjurandum, licet postea jurare actor nolit deferre, non videbitur remissum : nam quod susceptum est, remitti debet.

(c) Jurejurando dato, vel remisso, reus quidem acquirit exceptionem sibi, aliisque ; actor vero actionem acquirit, in quâ hoc solum queritur, an juraverit, dari sibi oportere, vel, cum jurare paratus esset, iurjurandum ei remissum sit.

Vice versa, if I had deferred the oath to the surety, and he had sworn that nothing was due, the law above cited, decides that this would avail the principal, because it is regarded as a payment. *d. l. 28*, and a payment by the surety liberates the principal.

For the same reason, an oath deferred to one debtor *in solido*, will operate in favour of the others.

These decisions apply, provided the oath is *de re, non de persona*, for if the surety only swore that he did not contract the engagement, the principal could not derive any advantage from it. *D. L. 28. § 1. L. 42. § 1. (a) ff. de Jurej.* So if one of the debtors *in solido* only swore that he did not contract the obligation, this would not be of any service to the others.

From the principle, that the decisory oath derives all its effect and authority from the agreement of the parties, this further consequence may be drawn, that if the party by whom it has been deferred would have just cause of restitution against the agreement, he may, by obtaining such restitution, destroy the effect of the oath.

As fraud is a ground of restitution against all agreements, if I can prove that I was induced by any fraud of yours to defer the oath, I may, by appeal from the judgment which has been given in your favour in consequence of your oath, or by *civile requête*, if the judgment is in the last resort, obtain letters of rescission, upon which, without regard to the act, whereby I have deferred the oath, or to the subsequent proceedings, each party will be restored to his former situation. We may state as an instance of fraud your suppression of a writing, which establishes my claim against you if, in consequence of my not having the writing, I defer the oath to you as to the justice of my claim; as it was your suppression of my title, and consequently your fraud which induced me to do so, I may, if I can obtain proof of this suppression, obtain restitution against the act by which the oath was deferred, as having been occasioned by such fraud.

This decision is not contrary to that of the law 15, *ff. de Excep.* above referred to, No. 822; which says, that *adversus exceptionem*

quoque eodem loco habendum est; si modo ideo interpositum est jusjurandum, ut de ipso contractu, et de re, non de persona jurantis ageretur.

(a) Si fidejussor juraverit, *se dari non oportere*, exceptione jurisjurandi reus promittendi tutus est; ac si, quasi omnino idem non fidejussisset, juravit, non debet hoc jusjurandum reo promittendi prodesse.

juris-

jurisjurandi non debet dari replicatio doli mali; for the fraud spoken of in this law, is only the perjury which the party who deferred the oath, may allege to have been committed in the taking of it; this perjury cannot be proved by even the most decisive titles afterwards discovered, because the oath operates as a presumption *juris et de jure*, by which what is sworn is conclusively taken to be true. Therefore, when you have sworn that you did not owe any thing, there cannot afterwards be any question, *an debeatur*. L. 5. § 2. ff. de *Jurej.* But as the oath has only this authority, inasmuch as it is deferred, and taken in an effectual manner, the question, whether it was so deferred and taken, is still open, *queritur an juratum sit*, § 2. and the person who deferred it, may shew that it was not effectually taken by proving your fraud; that is, by proving the artifices which you have used to induce him to defer it, as in the instance supposed, by your suppression of his title.

As minority is a cause of restitution, minors may sometimes obtain restitution against the effect of the oaths deferred by their tutors or themselves, with the assistance of their curators: this cannot be done indiscriminately, it ought not to be done, if they had no other proof at the time of deferring the oath, which would in that case be an act of prudence. This is shewn by *Ulpian*: *si minor detulerit, et hoc ipso captum se dicat, adversus exceptionem jurisjurandi replicari debet, ut Pomponius ait. Ego autem puto hanc replicationem non semper esse dandam, sed Praetorem debere cognoscere an captus sit, et sic in integrum restituere; nec enim utique qui minor est, statim se captum docuit.* L. 9. § 4. ff. de *Jurej.*

ARTICLE II.

Of the Oath of a Party interrogated upon Facts and Articles:

[826] When a party signifies facts upon which he obtains an order, that the opposite party shall be interrogated by the judge, the oath, which is taken upon such interrogatory, is very different from the decisory oath, for it forms no proof in favour of the party by whom it is made, but is evidence against him. The reason of the difference is, that the person who causes his adversary to be interrogated upon facts and articles, does so, not for the purpose of having the cause decided by the answer, but merely with a view

view of deducing some proofs, or presumptions, from the admissions which the party interrogated may make, or the contradictions which he may fall into; *ut confitendo vel mentiendo seoneret*, L. 4. ff. *de Inter. Inj. fac.*

[827] Observe, that a person who would take advantage of the confession made by the opposite party, upon his interrogatory, cannot divide the answer, but must take it altogether (a). If, for instance, I have no proof of the loan which I allege that I have made to you of a sum of money, I cannot take advantage of your acknowledgment of the loan, and reject the additional declaration that you have repaid the money; but I must take one part with the other; and, therefore, if I would make your answer a proof of the loan, I must also admit it as a proof of payment, without requiring from you any other evidence of that fact; at least, unless I am in a condition to prove that the payment could not be made at the time and place which you allege. With respect to these interrogatories, see the ordonnance of 1667, and the commentary of Mr. Jousse.

A R T I C L E III.

Of the Oath called Juramentum Judiciale.

[828] The oath called *juramentum judiciale* is that which the judge, of his own accord, defers to either of the parties.

There are two kinds of it, 1. That which the judge defers for the decision of the cause, and which is understood by the general name of *juramentum judiciale*, and is sometimes called the supplementary oath, *juramentum suppletorium*.

2. That which the judge defers, in order to fix and determine the amount of the condemnation that he ought to pronounce, and which is called *juramentum in litem*.

§ I. *Of the Oath which the Judge defers for the Decision of the Cause.*

[829] The use of this oath is established upon the authority of the law, 31. ff. *de Jurej.* which says, "*solent judices in dubiis causis exacto jurejurando secundum eum judicare qui juraverit*," and the law, 3 *Cod. de rebus creditis*, where it is said,

"is

(a) See App. No. XVI. § 4. p. 155. and following.

“ in bonæ fidei contractibus, necnon in cæteris causis, inopiâ probationum, per judicem jurejurando, causâ cognitâ, rem decidi oportet.”

From these texts it follows, that to warrant the application of this oath, three things must concur :

1. The demand, or the exceptions, must not be fully proved, as appears by the terms of *L. 3 Cqd.*—*INOPIA PROBATIONUM*. When the demand is fully proved, the judge condemns the defendant without having recourse to the oath ; and on the other hand, when the exceptions are fully proved, the defendant must be discharged from the demand.

2. The demand, or exceptions, although not fully proved, must not be wholly destitute of proof ; this is the sense of the terms *in rebus dubiis*, made use of in the law 31 ; this expression is applied to cases in which the demand, or exceptions, are neither evidently just, the proof not being full and complete, nor evidently unjust, there being a sufficient commencement of proof. *In quibus*, says *Vinnius, sel. quæst. 1, 44. judex dubius est, ob minus plenas probationes allatas.*

3. The judge must have entered upon the cognizance of the cause, to determine whether the oath ought to be deferred, and to which of the parties. This results from the terms *causâ cognitâ*, in *L. 31.*

[830] This cognizance of the cause consists in the examination of the merits of the proof, of the nature of the fact, and the qualities of the parties. When the proof of the fact which is the subject of the demand, or the exceptions, and upon which the decision of the cause depends, is full and complete, the judge ought not to defer the oath, but to decide the cause according to the proof.

Nevertheless, if the judge, for the more perfect satisfaction of his conscience, defers the oath to the party in whose favour the decision ought to be, and the fact upon which it is deferred is the proper act of the party himself, and of which he cannot be ignorant, he cannot refuse to take it, or appeal from the sentence : for, although the judge might, and even ought to have decided the cause in his favour, without requiring this oath, the proof being complete, he has still done no injury by requiring it, since it costs the party nothing to affirm what is true, and his refusal weakens and destroys the proof which he has made.

[831] When the plaintiff has no proof of his demand, or the proof which he offers only raises a slight presumption, the judge ought not to defer the oath to him, however worthy of credit

credit he may be. Nevertheless, if the circumstances raise some doubt in the mind of the judge, he may, to satisfy his conscience, defer the oath to the defendant.

So, when the demand being made out, the exceptions against it are only supported by circumstances, which are too slight to warrant deferring the oath to the defendant, the judge may, if he thinks proper, defer the oath to the plaintiff, before he decides in his favour.

I would, however, advise the judges to be rather sparing in the use of these precautions, which occasion many perjuries. A man of integrity does not require the obligation of an oath, to prevent his demanding what is not due to him, or disputing the payment of what he owes; and a dishonest man is not afraid of incurring the guilt of perjury. In the exercise of my profession for more than 40 years, I have often seen the oath deferred; and I have not more than twice known a party restrained by the sanctity of the oath, from persisting in what he had before asserted.

[832] The proper case for deciding by the oath of the parties is, when the proof is already considerable, and not quite complete.

From this rule we must, however, except causes of great importance, such as those of marriage. In these, if the plaintiff fails in proof, the defect cannot be supplied by his oath, but the case must be decided with the defendant.

In ordinary cases, if the defendant's proof of his exceptions is considerable, without being complete, the judge ought to supply the deficiency by his oath, in the same manner as he ought under similar circumstances to supply, by the oath of the plaintiff, the deficiency in his proof of the demand.

The judge, in choosing to which of the parties he will defer the oath, should also consider their quality, which of them is most worthy of credit, which should know most of the subject; *inspectis personarum et causa circumstantiis. Cap. Fin. X. de Jurej.*

[833] *Dumoulin, ad L. 3. Cod. de Reb. Cred.* states as an instance of incomplete proof which may be perfected by the oath of the defendant, that which results from the extrajudicial confession of a debtor, made in the absence of the creditor, or in his presence, without expressing the circumstances or cause of the debt.

The books of tradesmen are also an incomplete proof of their dealings, which may be supplied by their oath, when they are persons of acknowledged probity, *supra, n. 719.*

The

The doctors state as an instance of proof, which may be completed by the oath of the plaintiff, the deposition of a single witness when he is a man of credit; but it appears by our law that it is only in very trivial cases, that the deposition of a single witness, in addition to the oath of a plaintiff, will be sufficient to support the demand. See *supra*, n. 783.

[834] Although the cause has in the first instance been decided by the oath of one party, the judge of appeal may defer the oath to the other if he thinks it preferable, as we see every day.

[835] It remains to observe the following difference between an oath deferred by the judge, and that deferred by the party: the first may be referred back; whereas, when the oath is deferred by the judge, the party must either take it or lose his cause; such is the practice of the bar, which is without reason charged by *Faber* with error; in support of it, it is sufficient to advert to the term *refer*; for I cannot be properly said to refer the oath to my adversary, unless he has previously deferred it to me. See *Vinn. Sel. Quæst.* 143. (a)

§ II. *Of the Oath called Juramentum in Litem.*

[836] The oath called *juramentum in litem*, is that which the judge defers to a party, for the purpose of fixing and determining the amount of the condemnation, which he ought to pronounce in his favour.

The interpreters of the *Roman* law distinguish two oaths of this kind, one of which they call *juramentum affectionis*, the other *juramentum veritatis*.

Juramentum affectionis is the oath deferred by the judge to determine the value of the thing, whereof I have been deprived by the fraud of the adverse party, not as it is considered in itself, but according to my own attachment for it.

The judge will in this case estimate the amount of the consideration, by what I swear to be the value, that I *bonâ fide* set upon it, as a matter of personal attachment, a price of affection which may exceed the real value of the thing.

It is of this oath that *Ulpian* says, *non ab judice deli æstimatio ex eo quod interest fit, sed ex eo quod in litem juratur. L. 64. ff. de judic.* and elsewhere, *res ex contumaciâ æstimatur ultra rei pretium. L. 1. ff. de in Lit. Jur.*

(a) The use of the term *refer*, in the *English* language, would prevent the full application of this argument. The word *referre* is only fully translated by the phrase to *refer* BACK.

This *juramentum affectionis* is not in use with us; we only allow the *juramentum veritatis*.

[837] This oath is administered, whenever the plaintiff has lawfully established his right to the restitution of a thing, and it only remains to ascertain the sum in which the defendant ought to be condemned, for the non-restitution of things, the value of which can be known only to the plaintiff. The judge in this case decides upon the plaintiff's estimate of the value, having first administered the oath, that it shall be fairly and conscientiously made.

For instance, if a traveller has deposited a trunk with an inn-keeper, and the trunk has been stolen, and nobody but the traveller himself knows what was contained in it, the judge can only determine the amount of the condemnation by his oath upon the subject.

[838] With the *Romans*, the judge often allowed the plaintiff an indefinite latitude as to the sum, at which he estimated the things of which he demanded restitution, *jurare in infinitum licet*.

It was however in the discretion of the judge, when he thought proper, to limit the sum, beyond which the estimate should not be carried. *Judex potest præfinire certam summam usque ad quam juretur. L. 5. § 1. ff. d. Tit.*

With us, the judge, after hearing the parties, limits the extent to which the oath of the plaintiff ought to be received, with respect to the value of the thing demanded.

In fixing this sum, he should pay regard to the quality and situation of the plaintiff, and the greater or less degree of probability which appears in his allegations: the nature of the cause ought also to be taken into consideration; much less indulgence should be shewn to a defendant, who had wilfully deprived me of my property, than to one who had only been guilty of imprudence and want of care.

Although the judge may have referred the matter to the estimation of the plaintiff, without previously limiting the sum, he is not bound to follow it if it appears excessive: *etsi juratum fuerit, licet judici absolvere vel minoris condemnare. L. 5. § 2. ff. d. Tit.*

F I N I S.

ERRATA.

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Page.	Par.	Line.	
32	1	6	After <i>affection</i> read <i>supplying in this case a quality which</i> .
76	3	4	After <i>princip</i> insert <i>have</i> .
105			Note (c) for <i>interdere</i> read <i>intendere</i> , for <i>non fituet</i> read <i>constituet</i> .
108			Note (b) after <i>civilis</i> read <i>vel naturalis</i> .
109	7	7	For <i>valid</i> read <i>invalid</i> .
110	2	4	Ad finem, dele <i>in</i> , for the period insert a semicolon.
117	1	4	For <i>or of the debtor</i> read <i>of the debtor or</i> .
133	2	6, 7	Dele <i>of the condition</i> .
151	3	15	For <i>creditor</i> read <i>codebtor</i> .
173	3	7	For <i>it</i> read <i>them</i> .
	5	9	For <i>his</i> read <i>their</i> .
176	3	5	Dele <i>nevertheless</i> .
	5	9	For <i>debts</i> read <i>rights</i> .
		12	For <i>rights</i> read <i>debts</i> .
	3	19	For <i>of</i> read <i>from</i> .
192	3	5	Transpose the semicolon and comma.
126	3	7	After <i>estate</i> read <i>a moiety only</i> .
311	3	4	After <i>should</i> read <i>not</i> .
322	5	7	For <i>the actio estimatoria limited for</i> read <i>limited for the actio infortoria</i> .
358	3	8	After <i>obligation</i> read <i>that obligation</i> .
368			Note (d) Line 3, <i>between</i> and <i>by</i> read <i>not</i> .
376	1	3	For <i>the former rather than the latter</i> read <i>the latter rather than the former</i> .
405	2	19	Transpose the comma and semicolon.
442	1	11	For <i>if the condition of</i> read <i>of the condition if</i> .
481	3	6	For <i>to</i> read <i>or</i> .
525	4	7, 8	For <i>the sum that he has paid</i> read <i>that he has paid the sum</i> .
533	4	6	For <i>denied</i> read <i>decided</i> .
540	1	3	After <i>therefore</i> read <i>if</i> .
548	7	6	For <i>him</i> read <i>them</i> .
555	6	4	For <i>quæsturus</i> read <i>quæstionis</i> .
556	3	4	Place the period after <i>judicii</i> .
564	2	5	Dele <i>whereas</i> .

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